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After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions

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AFTER CARNIVAL CRUISE AND SKY REEFER: AN ANALYSIS OF FORUM SELECTION CLAUSES IN MARITIME AND AVIATION TRANSACTIONS

AXEL GEHRINGER*

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I. INTRODUCTION

IN THE LAST DECADES, international transportation of passengers and goods by sea has increased tremendously. As far as can be predicted today, international transportation by sea will increase further in the future. International transportation leads to contacts among different jurisdictions, and parties to a

transportation contract are often from different countries. If a dispute arises between these parties, a claimant often has a choice between alternative jurisdictions. This choice leads to uncertainty where future disputes will be resolved. One possible way to reduce uncertainty and risk is to agree in advance to submit controversies for resolution exclusively within a designated forum.¹ Such a contractual provision is typically referred to as an exclusive² "forum selection", "jurisdiction", or "choice of forum" clause.³ In maritime contracts, jurisdiction agreements are common.⁴

Even though it sounds very practical to agree in advance where suit should be brought, a forum selection clause is not entirely free of problems. Because parties to a transportation contract might have unequal bargaining power and experience, one party might try to use a forum selection clause to the disadvantage of another party. Therefore the question arises: should the law protect the party who has, as a result of an exclusive forum selection clause, waived his or her right to file suit in accordance with general rules of judicial jurisdiction? Is it necessary to protect passengers against forum selection clauses in passenger contracts that force them to bring suit far away from their home jurisdiction? Do businesses entering into contracts to transport goods by ship need some kind of judicial protection?

With respect to form passenger contracts and bills of lading, both questions have been answered by the United States Supreme Court in two important recent decisions, *Carnival Cruise Lines, Inc. v. Shute* (*Carnival Cruise*)⁵ and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (*Sky Reefer*).⁶ In the former, the

¹ See generally Gary B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 371 (3d ed. 1996). This article will not deal in detail with arbitration clauses.

² Two forms of forum selection agreements can be distinguished: exclusive and nonexclusive forum selection agreements. While the exclusive form requires that claims be filed only in the contractually determined forum, a nonexclusive forum selection agreement permits claims in a certain forum without precluding litigation in other fora. See *id.* at 454.

³ In the United States, a forum selection clause has to be distinguished from a choice of law provision. The first designates the proper forum, while the latter chooses the governing law. See *id.* at 373.

⁴ See PETER WETTERSTEIN, *Jurisdiction and Conflict of Laws Under the New Rules on Carriage of Goods by Sea*, in *NEW CARRIAGE OF GOODS BY SEA: THE NORDIC APPROACH INCLUDING COMPARISONS WITH SOME OTHER JURISDICTIONS* 328 (1997).

⁵ 499 U.S. 585 (1991).

⁶ 515 U.S. 528 (1995).

Supreme Court upheld a forum selection clause—with the result that cruise ship passengers residing in the state of Washington had to bring suit in Florida. In the latter, the Court upheld an arbitration clause—with the result that a New York fruit distributor shipping fruits from Morocco to the U.S. on a ship chartered by a Japanese company had to subject itself to arbitration in Japan. Both decisions prompted extensive criticism⁷ and led to proposals to overturn them by statutory provisions. As of April 2000, however, it seems that only the *Sky Reefer* decision may actually be overturned. In any event, if these proposals become reality, the common law rules concerning forum selection clauses will be superseded by statutory provisions that nullify forum selection clauses in certain maritime contracts. Therefore, how future statutes might deal with forum selection clauses is very important.

This article discusses whether U.S. law with respect to the enforceability of forum selection clauses in passenger contracts and bills of lading should be changed. The first part of the article addresses forum selection clauses in U.S. maritime law. First, an overview of the contemporary view of U.S. courts regarding the enforceability of forum selection clauses will be given. Subsequently, the article discusses the Supreme Court decisions, *Carnival Cruise* and *Sky Reefer*; how lower courts have applied these decisions; and what proposals have been made in the United States to overturn these decisions.

⁷ For criticism of *Carnival Cruise*, see Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L. J. 323 (1992); John McKinley Kirby, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888 (1992); Michael F. Sturley, *Strengthening the Presumption of Validity for Choice of Forum Clauses: Carnival Cruise Lines v. Shute*, 23 J. MAR. L & COM. 131 (1992) [hereinafter *Strengthening the Presumption*]; Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum Selection Clauses and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992).

For a critique concerning *Sky Reefer*, see Joseph C. Sweeney, *The Prism of COGSA*, 30 J. MAR. L & COM. 543 (1999); Cherie L. LaCour, *The Enforceability Of Foreign Arbitration Clauses Under the Carriage of Goods By Sea Act After Vimar Seguros Y Reaseguros, S.A. v M/V Sky Reefer*, 4 TULSA J. COMP. & INT'L L. 127 (1996); Michael F. Sturley, *Bill of Lading Forum Selection Clauses in the United States: The Supreme Court Charts a New Course*, 1996 LLOYD'S MAR. & COM. L.Q. 164 [hereinafter *New Course*]; Stanley L. Gibson, *Sky Reefer Muddies the COGSA Waters*, 9 U.S.F. MAR. L.J. 1 (1996); Charles M. Davis, *Sky Reefer: Foreign Arbitration and Litigation Under COGSA*, 8 U.S.F. MAR. L.J. 73 (1995).

Because shipping is almost exclusively an international business, shipping nations have always recognized that uniformity in maritime law is desirable. Therefore, international conventions have been established to achieve this goal. Any new statutory provision adopted by the United States should consider whether uniformity in maritime law is a goal and, if so, what kind of solutions the international shipping community has agreed upon. Moreover, it might be worthwhile to consider approaches taken by other jurisdictions. The second part of this article therefore describes solutions that can be found in international conventions concerning maritime law and aviation law, and provides additional examples of statutory provisions dealing with jurisdiction clauses in European and in German law. These provisions are interesting insofar as the chosen approach differs from the approach taken by U.S. law and by international maritime and aviation conventions.

In light of these examples, the last part of the article process how U.S. law should deal with forum selection clauses in maritime contracts in the future.

II. FORUM SELECTION CLAUSES IN U.S. MARITIME LAW

A. CONTEMPORARY VIEW OF U.S. COURTS ON FORUM SELECTION CLAUSES

Historically, U.S. courts viewed forum selection clauses in domestic and international disputes as *per se* unenforceable.⁸ Forum selection clauses were seen as agreements to oust the jurisdiction of courts and therefore as contrary to public policy. The traditional view, however, changed in the late 1940s,⁹ and in 1955, the Court of Appeals for the Second Circuit held in *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*¹⁰ that the enforceability of a forum selection clause depends upon its reasonableness.

⁸ See *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N.E. 678 (Mass. 1916); *Benson v. E. Bldg. & Loan Assn.*, 66 N.E. 627 (N.Y. 1903); *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 441, 445 (1874) (dealing with the validity of a Wisconsin statute). In *Morse*, the court held that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void." *Id.* at 445. See generally, Francis M. Dougherty, J.D., Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404, 409-411; Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138-140 (1982).

⁹ *Krenger v. Pa. R.R. Co.*, 174 F.2d 556, 561 (2d Cir. 1949).

¹⁰ 224 F.2d 806 (2d Cir. 1955), *cert. denied*, 350 U.S. 903 (1955).

The "leading contemporary U.S. case on the enforceability of forum clauses"¹¹ is the decision of the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*¹² There, the Court held that a forum selection clause is prima facie valid and enforceable unless the party seeking to avoid enforcement shows strong reasons to set the clause aside.¹³ *The Bremen* involved Zapata, an American corporation, and Unterweser, a German corporation, that entered into a towage contract, whereby Unterweser agreed to tow Zapata's oceangoing drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. According to the agreement, any dispute arising under the contract was to be resolved in the London Court of Justice. During a storm in the Gulf of Mexico, the rig was seriously damaged. Zapata ordered Unterweser's ship to tow the rig to Tampa, Fla., the nearest point of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal district court at Tampa. Citing the forum clause, Unterweser moved to dismiss. The district court denied Unterweser's motion, and the Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court reversed, holding that a forum selection clause is prima facie valid and enforceable absent a strong showing of some reason for setting it aside. The Court discussed several reasons why a forum selection clause could be set aside. First, a defect in the formation of a contract could invalidate a forum selection clause. Such defects include overreaching, undue influence, or overweening bargaining power.¹⁴ Second, a forum selection clause could be set aside if enforcement of the clause would be unreasonable and unjust.¹⁵ Finally, the Court accepted that a court could set aside a forum selection clause where such a clause "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."¹⁶ The Court made clear that the party challenging enforcement bears the burden of proving that a forum selection clause should be set aside.¹⁷

¹¹ BORN, *supra* note 1, at 377.

¹² 407 U.S. 1 (1972).

¹³ *Id.* at 10. The Court followed the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

¹⁴ *The Bremen*, 407 U.S. at 12, 15.

¹⁵ *Id.* at 15.

¹⁶ *Id.*

¹⁷ *Id.*

The Court named three reasons that support the ruling that forum selection clauses should be presumptively valid,¹⁸ namely greater certainty in agreements between companies of different nations, judicial economy,¹⁹ and notions of freedom of contract.²⁰ Moreover, the Court stated that

[T]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."²¹

The Court stressed the importance of an arm's-length negotiation by expressly noting that the choice of forum in the contract between Zapata and Underweser was made in an arm's-length negotiation by experienced and sophisticated businessmen.²²

The Bremen provided a theoretical framework for analyzing the validity and enforceability of forum selection clauses. But even though *The Bremen* was a decision in admiralty law, there was no certainty as to the question whether forum selection clauses in all maritime contracts were likewise enforceable. *The Bremen* had dealt with a towage contract, which was not regulated by federal law. Therefore, the holding in *The Bremen* seemed to be limited to forum selection clauses in maritime contracts not otherwise governed by federal statutes. The two most prevalent contracts in maritime law, however, are form carriage contracts²³ on passenger vessel tickets and bills of lading²⁴—both of which are regulated by federal law. It was therefore unclear, whether special statutory provisions in federal maritime law would make forum selection clauses in these types of contracts unenforceable. Moreover, the language in *The Bremen* was relatively broad. It was therefore necessary to refine the *The Bremen* holding in order to apply it to other forms of maritime contracts.

¹⁸ *Id.* at 8-15; see also Jeffrey A. Liesemer, *Carnival's Got the Fun . . . And the Forum: A New Look at Choice-Of-Forum Clauses and the Unconscionability Doctrine After Carnival Cruise Lines, Inc. v. Shute*, 53 U. PITT. L. REV. 1025, 1034-1037 (1992).

¹⁹ The Court stated that all courts are overloaded with cases. See *The Bremen*, 407 U.S. at 12.

²⁰ Enforcement of forum selection clauses "accords with ancient concepts of freedom of contract." *Id.* at 11.

²¹ *Id.* at 9.

²² *Id.* at 12.

²³ 46 U.S.C. § 183c (1994).

²⁴ 46 U.S.C. § 1303(8) (1994).

Two important recent decisions of the Supreme Court resolved these questions. First, the decision in *Carnival Cruise* resolved the question whether forum selection clauses in form passenger tickets are enforceable. Second, in the *Sky Reefer* decision, the Court decided whether a foreign arbitration clause in a bill of lading is valid.

1. *Form Passenger Contracts: Carnival Cruise Lines, Inc. v. Shute*

a. The Decision

In *Carnival Cruise Lines, Inc. v. Shute*,²⁵ the Court found the forum selection clause in a form cruise line's passenger ticket valid and enforceable, designating Florida as the exclusive forum for all disputes and matters arising under the passage contract. Mr. and Mrs. Shute, residents of the state of Washington, had purchased passage for a cruise between Los Angeles and Puerto Vallarta, Mexico. The cruise was operated by Carnival Cruise Lines, a Panamanian corporation having its principle place of business in Miami, Florida. The Shutes had purchased the tickets through a travel agent in Washington. They paid the fare to the agent who then forwarded the payment to Carnival's headquarters in Miami, Florida. There, the tickets were prepared and then sent back to the Shutes. The face of each ticket, at its left-hand lower corner, contained the following admonition: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES **IMPORTANT!** PLEASE READ CONTRACT ON LAST PAGES 1, 2, 3. . .

The following appeared on "contract page 1" of each ticket²⁶:

TERMS AND CONDITIONS OF
PASSAGE CONTRACT TICKET

. . . 3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket. . . .

. . . 8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U. S. A., to the exclusion of the Courts of any other state or country. . . .

²⁵ 499 U.S. 585 (1991)

²⁶ The ticket is reproduced as an Appendix to the Court's decision. *Id.* at 605.

. . .16. (a) The carrier shall not be liable to make any refund to passengers in respect to lost tickets or in respect of tickets wholly or partly not used by a passenger. . . .

During the cruise, while the ship was in international waters, Mrs. Shute was injured. The Shutes brought suit against Carnival Cruise Lines, Inc. in the United States District Court for the Western District of Washington claiming that Mrs. Shutes's injuries had been caused by Carnival's negligence. The district court granted the corporation's motion for summary judgment, on the ground that the corporation's contacts with the state of Washington were insufficient to support the district court's exercise of personal jurisdiction over the corporation. On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded,²⁷ ruling that (1) Carnival Cruise Line did have sufficient contacts with the State of Washington to support specific personal jurisdiction;²⁸ and (2) it would be unreasonable to apply the forum-selection clause of the ticket contract in the case at hand. The court of appeals concluded that "because of the *parties disparity in bargaining power*" the application of the forum selection clause was unreasonable.²⁹ The court stressed that the provision was printed on the ticket and presented to the purchaser on a take-it-or-leave-it basis with no possibility to bargain about the provision. The court distinguished the case from the facts in *The Bremen* where two sophisticated parties with equal bargaining positions had agreed to the clause and each party had the chance to alter the forum selection provision.

The Supreme Court reversed. Initially, the court stated that, in examining the reasonableness of a forum selection clause, it intended to *refine* the analysis of *The Bremen* and to account for the realities of form passenger contracts.³⁰ The Court looked at the realities of form passenger contracts and concluded that "it would be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form."³¹ According to the Court "common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bar-

²⁷ *Shute v. Carnival Cruise Lines, Inc.*, 863 F.2d 1437 (9th Cir. 1988).

²⁸ This ruling was affirmed by the Washington Supreme Court. *See Shute v. Carnival Cruise Lines, Inc.*, 783 P.2d 78 (Wash. 1989).

²⁹ *Shute*, 897 F. 2d at 388 (emphasis added).

³⁰ *Carnival Cruise*, 499 U.S. at 593.

³¹ *Id.* at 593.

gaining parity with the cruise line."³² Equal bargaining power, the Court held, is not a necessary requirement for enforcing forum selection clauses.

The court then considered the reasonableness of a forum selection clause in such a contract. The court looked at the interests of cruise line companies and identified three reasons why it would be reasonable for a cruise line company to include a forum selection clause in a form passenger ticket.³³ First, it is likely for cruise lines to become subject to litigation. Therefore, cruise lines have a special interest in limiting the possible forum where suit can be brought. Second, a clause establishing *ex ante* the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense and conserving judicial resources. Finally, the Court stated that passengers benefit from forum selection clauses in the form of reduced fares that reflect the savings a cruise line enjoys by limiting the forum in which it may be sued.

In dicta, the Court stated "forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."³⁴ But, in the case at hand, the Court found no indication that the forum selection clause would violate standards of fundamental fairness. Designating Florida as the forum in which disputes were to be resolved was not a means of discouraging cruise passengers from pursuing legitimate claims. Carnival had its principal place of business in Florida, and many of its cruises departed from and returned to Florida ports. Moreover, there was no evidence that Carnival had obtained respondents' accession by fraud or overreaching.

A second issue was whether the forum-selection clause in the passage contract violated the Vessel Owner's Liability Act.³⁵ The statute provides in § 183c:

It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of

³² *Id.*

³³ *Id.* at 593-594.

³⁴ *Id.* at 595.

³⁵ 46 U.S.C. App. § 183c (1988).

liability for such loss or injury, or the measure of damages therefor.

All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.³⁶

Plaintiffs argued that the forum selection clause does in fact “lessen, weaken or avoid the right of a claimant to a trial by court of competent jurisdiction.”³⁷ The Court held that “by its plain language, the forum-selection clause before us does not take away respondents’ right to “a trial by [a] court of competent jurisdiction”³⁸ and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought “if at all,” in a court “located in the State of Florida,” which, plainly, is a “court of competent jurisdiction” within the meaning of the statute.³⁹ The Court therefore denied that § 183c renders a forum selection clause unenforceable and reversed the decision of the Court of Appeals.

b. Discussion

When the validity of a forum selection clause in a form passenger contract is litigated, two questions normally arise. First, the court must decide whether the forum selection clause printed on the back of the ticket or in similar form⁴⁰ has become a part of the passenger contract, even though the passenger was not aware of the provision. In other words, has the forum selection clause been incorporated into the contract? Second, when the forum selection clause has become part of the contract, whether such a clause is valid and can be enforced. In *Carnival Cruise*, the Court did not address the first question, because the Shutes conceded that the clause was *reasonably commu-*

³⁶ *Id.*

³⁷ *Carnival Cruise*, 499 U.S. at 596.

³⁸ *Id.*

³⁹ *Id.* Moreover, the Court rejected the argument that Congress in enacting § 183c intended to avoid having a plaintiff travel to a distant forum in order to litigate. The court ruled that “the legislative history of § 183c instead suggests that this provision was enacted in response to passenger-ticket conditions purporting to limit the ship owner’s liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that ‘the question of liability and the measure of damages shall be determined by arbitration.’” *Id.*

⁴⁰ Often the terms of the contract appear on the second or later page of the ticket.

nicated to them.⁴¹ Nevertheless it is important to discuss this issue here, because one reason why forum selection clauses are problematic is the way they are communicated to passengers.

The Shutes's concession in *Carnival Cruise* that the forum selection clause had been reasonably communicated to them was a reference to a longstanding rule in maritime law, the "reasonable communicativeness test." U.S. courts accept that terms are incorporated into a contract when they are reasonably communicated to a party.⁴² Terms are reasonably communicated to a party when the ticket sufficiently warns passengers of the provisions. Once the terms and conditions of a ticket contract have been "reasonably communicated" to the passenger, they are incorporated into a contract, regardless of whether or not the passenger has actually read them.⁴³ Similar tickets to those used by Carnival Cruise Lines have been upheld by courts in the past as having been reasonably communicated to the passengers.⁴⁴

Therefore, in *Carnival Cruise* the only relevant question was whether a forum selection clause in a form passenger contract is valid and enforceable. Analyzing the decision of the Supreme Court, it seems questionable whether the Court was successful in refining the *The Bremen* decision to account for realities in a form passenger contract. The core issue in *Carnival Cruise* was whether the interests of consumers or the interests of cruise line companies should prevail with respect to forum selection clauses in form passenger contracts. Consumers have an interest in being protected against forum selection clauses in form passenger contracts that require them to give up their right to file suit in a state to which the company that is selling the tickets has sufficient contacts to be subjected to personal jurisdiction.⁴⁵

Cruise line companies, on the other hand, argue that they might be subjected to lawsuits in all fifty states and therefore

⁴¹ *Carnival Cruise*, 499 U.S. at 590. A possible way to distinguish a case from *Carnival Cruise* is therefore to show that a passenger had no notice of the forum selection clause.

⁴² See, e.g., *Hodes v. S.N.C. Achille Lauro*, 858 F.2d 905 (3d Cir. 1988); *Shankles v. Costa Armatori*, 722 F.2d 861 (1st Cir. 1983); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983). But see *Chasser v. Achille Lauro Lines*, 844 F.2d 50 (2d Cir. 1988).

⁴³ *DeCarlo v. Italian Line*, 416 F. Supp. 1136, 1137 (S.D.N.Y. 1976); *Geller v. Holland-America Line*, 201 F. Supp. 508 (S.D.N.Y. 1961).

⁴⁴ See, e.g., *McQuillian v. "Italia" Societa per Azione di Navigazione*, 386 F. Supp. 462, 466 (S.D.N.Y. 1974), *aff'd*, 516 F.2d 896 (2d Cir. 1975); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563, 564 (S.D.N.Y. 1987).

⁴⁵ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

want to protect themselves in their passenger contracts.⁴⁶ Which of these contrary interests is given greater weight is, at the end, a value judgment. The critical aspect of the *Carnival Cruise* decision was, however, that even though the Court realized that a form passenger contract is a contract of adhesion,⁴⁷ and therefore must to be scrutinized more carefully than a freely reached contract between parties of equal bargaining power, the Court failed to give any weight in its analysis to the goal of consumer protection. The Court was therefore not very sensitive to the concern of passengers in balancing the competing interests. Instead of appreciating that the existence of a contract of adhesion is an argument against enforcing a forum selection clause, the Court seemed to hold that the existence of an adhesion contract is an argument in favor of upholding the validity of a forum selection clause. This approach is at least questionable and was surprising because, in *The Bremen*, the Court had not only stressed the fact that the parties were sophisticated businessmen but explicitly distinguished the towage contract from "a form contract with boilerplate language that Zapata had no power to alter."⁴⁸

A contract of adhesion is a standard form contract offered on a take-it-or-leave-it basis by a party with stronger bargaining power to a party with weaker power.⁴⁹ Such a contract is not the result of bargaining between the parties. Additional characteristics of a contract of adhesion are⁵⁰ that (1) the form has been drafted by, or on behalf of, one party to the transaction; (2) the drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine; (3) the form is presented to the adhering party with the representation that the drafting party will enter into the transaction only on the terms contained in the document—this representation may be explicit or may be implicit in the situation, but it is understood by the adhering party; (4) the adhering party enters into few transactions of the type repre-

⁴⁶ In a serious disaster, however, the limitation and concurrent provisions of 46 U.S.C. §§ 183 and 185 would prevent suit in multiple jurisdictions. 46 U.S.C. §§ 183, 185 (1994).

⁴⁷ The term was used the first time by Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

⁴⁸ *The Bremen*, 407 U.S. at 12-13.

⁴⁹ *Carnival Cruise*, 499 U.S. at 600 (Stevens, J., dissenting).

⁵⁰ Todd D. Rakoff, *Contracts of Adhesion: An Essay of Reconstruction*, 55 HARV. L. REV. 1174 (1983).

sented by the form—few, at least, in comparison with the drafting party; and (5) the adhering party is in practice unlikely to have read the standard terms before signing the document.

A typical form passenger contract, such as the form passenger contract in *Carnival Cruise*, fits this description of an adhesion contract. A passenger ticket is a contract, drafted by the cruise line company and used by it as a matter of routine. The passenger is not aware of the standard terms unless the cruise line sends him the ticket, but then he cannot return the ticket, because the money paid is not refundable. The passenger therefore cannot change the terms of the ticket.

When courts have been required to deal with provisions in a contract of adhesion, they generally subject such provisions to a careful scrutiny to determine whether the terms of the contract are unconscionable.⁵¹ It is not unusual for U.S. courts to nullify provisions of adhesion contracts if unconscionable. Before *Carnival Cruise*, U.S. courts have quite often invalidated forum selection clauses in adhesion contracts.⁵² The test of unconscionability is a two-part test containing procedural and substantive elements.⁵³ Gross inequality of bargaining power, fine-print boilerplate provisions, and lack of knowledge are elements that can satisfy the procedural element of unconscionability. The substantive element is satisfied if the contract terms are unreasonably favorable to one party. The Shutes and Carnival Cruise did not have the same bargaining power, and the forum selection clause was printed in fine-print boilerplate language. Therefore the question is whether the forum selection clause was unreasonably favorable to Carnival Cruise Lines. As already stated the answer to that question is a matter of balancing the interests of passengers and cruise line companies.

Let us first turn to the interests of cruise line companies. There is no doubt that it is necessary for cruise lines to use standard form contracts. For a company selling cruises to thousands of passengers each year it is necessary and inevitable to use standardized contracts prepared in advance. There can be no doubt either that the inclusion of a forum selection clause in every passenger ticket is in the interest of a cruise line. A forum selection

⁵¹ See Mullenix, *supra* note 7, at 3-55.

⁵² E.g., Colonial Leasing Co. of New Eng. v. Pugh Bros. Garage, 735 F.2d 380 (9th Cir. 1984); Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756 (E.D. Va. 1986).

⁵³ Liesemer, *supra* note 18, at 1038.

clause reduces juridical risk and transaction costs.⁵⁴ The cruise line does not have to litigate in different fora, which leads to more predictability as to the outcome of litigation. Cost reductions result because the cruise line incurs less cost for litigation in a nearby forum and can rely always on the same local counsel. It can even be argued that passengers as a whole may benefit from this cost reduction.

On the other hand, a forum selection clause is at the same time disadvantageous for passengers who want to file suit. In the context of an adhesion contract, the passenger has an interest in being protected against oppressive, surprising, or basically unfair provisions.⁵⁵ By "accepting" an exclusive forum selection clause, the adhering consumer waives the right to file suit in a court where the defendant cruise line has sufficient minimum contacts. Generally a party may agree to waive statutory rights.⁵⁶ But when a party is not aware of the fact that he is waiving his right, it can then be persuasively argued that such a provision is unreasonably favorable to the ship line. The Court failed to balance these interests in its *Carnival Cruise* decision. Moreover, the arguments employed to support the reasonableness of the forum selection clause are likely to be present whenever an agreement contains a forum selection clause. Therefore, *Carnival Cruise* will validate almost every forum selection clause.⁵⁷

Instead of using the *The Bremen* approach of presuming the validity of a forum selection clause, which was drafted in the context of a towage contract between two sophisticated businessmen, the Court could have used the approach for scrutinizing a contract of adhesion. This approach would have been more favorable to the Shutes. Under the *The Bremen* approach, the Shutes had to rebut the presumption of validity, while under the unconscionability test, they would have had only to show that

⁵⁴ See Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 336 (1996).

⁵⁵ See Mullenix, *supra* note 7, at 354.

⁵⁶ E.g., *Sovereign Camp, W. O. W. v. Heflin*, 3 S.E. 2d 559 (Ga. 1939); *In Re Cook's Will*, 154 N.E. 823 (N.Y. 1926); *Motor Contract Co. v. Van Der Volgen*, 298 P. 705 (Wash.1931); *Cotton States Mut. Ins. Co. v. Bibbee*, 131 S.E.2d 745 (W. Va. 1963).

⁵⁷ See Borchers, *supra* note 7, at 74. "These factors amount to no real limitation on enforcement. Every large enterprise runs the risk of suits in multiple fora; every forum selection agreement simplifies the jurisdictional inquiry if enforced; reduced transaction costs always hold the theoretical possibility of consumer benefit." *Id.*

the clause was unreasonable.⁵⁸ With its decision, the Court strengthened the position of cruise lines by allowing them to put forum selection clauses in their form passenger contracts. The Court likewise effectively narrowed the circumstances in which a U.S. court will hold a choice of forum clause unreasonable.⁵⁹ Neither the adhesive nature of a contract, the unequal bargaining power,⁶⁰ nor the inability of one party to negotiate the terms of the contract is a reason to hold that a forum selection clause is unreasonable. One commentator has noted that *Carnival Cruise* holds the promise of turning forum selection agreements "from instruments of economic freedom to instruments of economic oppression."⁶¹

c. The Aftermath of Carnival Cruise

After the decision of the Supreme Court in *Carnival Cruise*, two questions arose: first, whether the decision should be overturned by amending 46 U. S. C. App. § 183c; and second, how strictly should lower courts apply the standards set by the Supreme Court, especially when the clause designates a forum in a foreign country as the exclusive forum.

i. Statutory Amendments

Carnival Cruise provoked a flood of criticism and statutory amendments were proposed to overturn the decision.⁶² In

⁵⁸ Judge J. Skelly Wright's statement made in *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445, 449-450 (D.C. Cir. 1965), which is reproduced in Justice Steven's dissent, describes quite well the rationale behind the reasonableness test:

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was even given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the Court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id. at 449-50 (footnotes omitted).

⁵⁹ *Strengthening the Presumption*, *supra* note 7, at 131.

⁶⁰ Overweening bargaining power was mentioned explicitly by the Supreme Court in *The Bremen*, 407 U.S. at 12.

⁶¹ Borchers, *supra* note 7, at 94.

⁶² See Michael F. Sturley, *Forum Selection Clauses in Cruise Line Tickets: An Update on Congressional Action "Overruling" the Supreme Court*, 24 J. MAR. L. & COM. 399

1992, as part of the Oceans Act, 46 U. S. C. App. § 183c was amended by including the word “any” before the phrase “court of competent jurisdiction.”⁶³ The relevant part of § 183c then provided that “it shall be unlawful . . . (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by any court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor.” This amendment was intended to overturn the Supreme Court decision in *Carnival Cruise*.⁶⁴ The result of including the word “any” before the phrase “court of competent jurisdiction” was that it would no longer be possible for a vessel owner to file a motion to dismiss an action for improper venue or to transfer the action to a proper venue, so long as the court had jurisdiction according to general rules of personal and subject matter jurisdiction.

But in 1993, as part of the Coast Guard Authorization Act, 46 U. S. C. App. § 183c was amended again by replacing “any court” in clause (2) with “court.”⁶⁵ Even though the Coast Guard Authorization Act only restored 46 U.S.C. App. § 183c to the pre 1992 version, the House and Senate differed over the interpretation of this amendment. The House’s section-by-section analysis of the Act’s provisions stated that the amendment (§ 309) “should not be construed to mean that a vessel owner may enforce a forum selection clause in a passenger ticket.”⁶⁶ Three months later, the Senate rejected this interpretation. Several senators explicitly stated that § 309 reinstated the Supreme Court decision in *Carnival Cruise* as the applicable law for interpreting forum selection clauses and that the House’s section-by-section analysis of the Coast Guard Authorization Act was contrary to the intent of the Senate. The senators explained that they had restored the old version of 46 U.S.C. App. § 183c because Congress had overturned a Supreme Court decision with-

(1993) [hereinafter *Update*]; see also, Borchers, *supra* note 7, at 107-111 (proposing a forum selection statute).

⁶³ Pub. L. No. 102-587, 106 Stat. 5039.

⁶⁴ 139 CONG. REC. 32,038 (daily ed. Nov. 22, 1993) (statement of Rep. Studds); see also *Compagno v. Commadore Cruise Line, Ltd.*, No. 94-1814, 1994 U.S. Dist. LEXIS 11933, at *5; (E.D. La. Aug. 19, 1994).

⁶⁵ 46 U.S.C. App. § 183c (1994); see also 139 CONG. REC. 31,669 (daily ed. Nov. 22, 1993).

⁶⁶ 139 CONG. REC. 32,040 (daily ed. Nov. 22, 1993); see also 139 CONG. REC. 32,038 (daily ed. Nov. 22 1993) (“We do not intend by this amendment to restore the standard set by the Supreme Court in its 1991 decision, *Carnival Cruise Line v. Shute*”) (statement of Rep. Studds.)

out complying with proper legislative proceedings.⁶⁷ The view of the Senate prevailed. Courts have considered themselves bound by the *Carnival Cruise* decision.⁶⁸ But the question remains whether *Carnival Cruise* should be overturned by a statutory provision.

ii. Application of *Carnival Cruise* in Lower Courts

After *Carnival Cruise*, commentators predicted that "dismissal or transfer of admiralty cases filed outside the chosen forum will probably be almost automatic, at least in federal court."⁶⁹ In the end, they were right. Since *Carnival Cruise*, courts have generally enforced reasonably communicated forum selection clauses in form passenger contracts wherever the passenger is forced to file suit.⁷⁰ This is true, even when a United States citizen, who has bought a ticket in the U.S., has to file suit outside of the U.S., because the forum selection clause has designated a foreign forum as the proper forum. In *Carnival Cruise*, the Court held that the Shutes's failed to satisfy their burden of proof to set aside the forum selection clause on grounds of inconvenience, because Florida was not a *remote alien* forum in which to

⁶⁷ "While it is perfectly legitimate for the Congress to overturn a Supreme Court decision within the bounds of the Constitution, we do not believe such changes should be made without notification to, and careful consideration by, the Members of Congress responsible for enactment of the legislation. As part of this consideration, we believe that the interested parties should have an opportunity to comment on any changes. At no time prior to the passage of the Oceans Act of 1992 was legislation introduced or did the House or Senate hold hearings on the cruise ship venue concern addressed by section 3006 of the Oceans Act." 140 CONG. REC. 3075 (daily ed. Feb. 24, 1994) (statement of Sen. Beaux). *See also, Update, supra* note 62, at 399 (stating that the provision was buried in a 68 page act, that there had been no published bill including the provision and no Congressional Report discussing it, leaving the industry completely surprised and with no opportunity to oppose the amendment).

⁶⁸ *Compagno*, 1994 U.S. Dist. LEXIS 11933, at *5.

⁶⁹ *Strengthening the Presumption, supra* note 7, at 141.

⁷⁰ *Carron v. Holland Am. Line-Westours Inc.*, 51 F. Supp. 2d 322 (E.D.N.Y. 1999) (resident of New York had to litigate in the State of Washington); *Perez v. Carnival Cruise Lines*, 993 F. Supp. 39 (D.P.R. 1998) (resident of Puerto Rico had to litigate in Florida); *Amador-Aviles v. Royal Caribbean Cruise*, No. 96-2470 (DRD), 1997 U.S. Dist. LEXIS 9986 (July 2, 1997) (same); *Gomez v. Royal Caribbean Cruise Lines*, 964 F. Supp. 47 (D.P.R. 1997) (same); *Igneri v. Carnival Corp.*, No. 95 CV 2859, 1996 U.S. Dist. LEXIS 22484 (E.D.N.Y. 1996) (resident of New York had to litigate in Florida); *Colby v. Norwegian Cruise Lines, Inc.*, 921 F. Supp. 86 (D.Conn. 1996) (resident of Connecticut had to litigate in Florida); *Melnik v. Cunard Line Ltd.*, 875 F. Supp. 103 (N.D.N.Y. 1994) (resident of the Northern District of New York had to litigate in the Southern District of New York).

require the Washington state residents to litigate.⁷¹ This holding could have been interpreted to mean that the Supreme Court would consider a foreign alien forum as inconvenient and therefore unreasonable. Lower courts, however, have considered remote foreign fora as not inconvenient as well.

In *Effron v. Sun Line Cruise, Inc.*⁷², for example, the Court upheld a forum selection clause in a form passenger contract designating Athens, Greece as the exclusive forum.⁷³ The case involved the purchase of a South American vacation package from Sun Line Cruises, a New York firm, through a Florida-based travel agent by Mrs. Effron, a resident of Florida. The transportation of passengers and baggage was provided solely by Sun Line Greece Special Shipping Co., Inc, a Greek company. The purchased ticket informed passengers that the carrier with whom they were contracting was Sun Line Greece, and the company's Greek address and phone number were listed on the face of the ticket. The ticket contained a forum selection clause—the existence of which was reasonably communicated to Mrs. Effron—designating Athens, Greece as the exclusive forum.⁷⁴ During the cruise, Mrs. Effron was injured as a result of a ship-board fall. She brought suit against Sun Line Cruises and Sun Line Greece in New York, where she maintained a second residence and where Sun Line Cruise did business. The U.S. District Court for the Southern District of New York refused to enforce the forum selection clause holding that Mrs. Effron had met her burden to show that filing suit in Greece would be a grave inconvenience. The district court stressed the fact that neither plaintiff, nor the occurrence sued on, had any connection with Greece.⁷⁵ The United States Court of Appeals for the Second Circuit, however, reversed.

⁷¹ *Carnival Cruise*, 499 U.S. at 594.

⁷² *Effron v. Sun Line Cruise, Inc.*, 67 F.3d 7 (2nd Cir. 1995).

⁷³ See also *Bounds v. Sun Line Cruises, Inc.*, 1997 Am. Mar. Cases 25 (C. D. Cal. 1996) (upholding forum selection clause designating Greece as the proper forum); *Mainzer v. Royal Olympic Cruises, Ltd.*, 677 N.Y.S. 2d 668 (N.Y. App. Div. 1998) (same).

⁷⁴ The forum-selection provision of the Passage contract, reads as follows:

Notwithstanding anything to the contrary contained herein, any action against the Carrier must be brought only before the Courts of Athens[,] Greece to the jurisdiction of which the Passenger submits himself formally excluding the jurisdiction of all and other court or courts of any other country or countries which court or courts otherwise would have been competent to deal with such action.

Effron, 67 F.3d at 8.

⁷⁵ *Effron v. Sun Line Cruises, Inc.*, 857 F. Supp. 1079, 1083 (S.D.N.Y. 1994).

The Court of Appeals held that "a forum is not necessarily inconvenient because of its distance from pertinent parties or places if it is readily accessible in a few hours of air travel."⁷⁶ Relying on *Sky Reefer*,⁷⁷ the court ruled that the costs and difficulties entailed in suing in Greece, "being but the obvious concomitants of litigation abroad, do not satisfy *The Bremen* inconvenience standard."⁷⁸ The court suggested that the problem of transporting witnesses to Greece might be resolved by a commission rogatoire, whereby Greek courts may request American courts to take testimony. The court's reliance on *Sky Reefer* is questionable because *Sky Reefer* did not involve a form passenger contract but a form bill of lading. In any event, *Effron v. Sun Line Cruise* made clear that *Carnival Cruise* cannot be distinguished by arguing that a foreign forum is less convenient than a forum within the United States. A distinction between foreign and domestic fora in determining inconvenience is thus seemingly eliminated. *Effron* is another example of the recent tendency among U.S. courts to enforce all types of forum selection agreements, no matter where the forum is located, and no matter whether such an agreement was concluded between sophisticated businessmen or between sophisticated businessmen and unsophisticated passenger-consumers.

2. Bills of Lading: The Sky Reefer Decision

The second important contract in maritime law is the bill of lading.⁷⁹

a. Historical Background

In the United States, bills of lading have been governed by statute for more than one hundred years. In 1893 Congress enacted the Harter Act⁸⁰ to limit the possibility for carriers to include in their bills of lading liability exemptions. In 1937 the Harter Act was supplemented with the Carriage of Goods by Sea Act (COGSA), which remains U.S. law with respect to bills of

⁷⁶ *Effron*, 67 F.3d at 10. The Court cited *Calavo Growers of Calif. v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring).

⁷⁷ 515 U.S. 528 (1995).

⁷⁸ *Effron*, 67 F.3d at 10.

⁷⁹ The three functions of a bill of lading are: A bill of lading acts as a receipt, a contract of carriage, and a document of title. See WILLIAM TETLEY, *MARINE CARGO CLAIMS* 6 (2d ed. 1978).

⁸⁰ 46 U.S.C. app. §§ 190-196 (1994).

lading.⁸¹ COGSA was based on the Hague Rules, a multinational treaty adopted in Brussels in 1924 and ratified by the U.S. in 1937.⁸² COGSA applies not only to carriage of goods from any U. S. port to any other port but also to carriage of goods to any U.S. port. It limits the ability of carriers to include exemptions from liability in their bills of lading. Section 1303 (8) of COGSA, like Article 3 (8) of the Hague Rules, reads as follows:

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.⁸³

Cargo owners invoked § 1303 (8) of COGSA to file suit in the U.S. despite forum selection clauses designating a non-United States forum. They argued that additional costs of filing suit abroad (such as traveling expenses or expenses in transporting expert witnesses there to testify) would effectively *lessen the liability of defendants* and that § 1303 (8) of COGSA invalidates such a clause.

In *Wm. H. Muller & Co., v. Swedish Am. Line Ltd.*,⁸⁴ the Court of Appeals for the Second Circuit rejected that argument. The court held that § 1303 (8) COGSA did not *per se* invalidate choice of forum clauses, and that if Congress had intended to invalidate choice of forum clauses it would have done so expressly.⁸⁵ The court did not accept the argument that the possibility of incurring increased expenses as a result of the foreign proceedings was a lessening of liability within the meaning of § 1303 (8) COGSA.

But twelve years later, *Muller* was overruled by *Indussa Corp. v. S.S. Ranborg*,⁸⁶ where the same Circuit Court of Appeals ruled that *Muller* was inconsistent with COGSA. This time, the court concluded that COGSA invalidated forum selection clauses in bills of lading. The court argued that the language of § 1300 of COGSA indicated that American law must always apply in cases

⁸¹ 46 U.S.C. app §§ 1300-1313 (1994).

⁸² See Sweeney, *supra* note 7, at 559-72.

⁸³ 46 U.S.C. app. § 1303(8) (1994).

⁸⁴ 224 F.2d 806 (2d Cir. 1955) (involving a bill of lading that required disputes to be resolved in Swedish courts).

⁸⁵ *Id.* at 807.

⁸⁶ 377 F.2d 200 (2d. Cir. 1967); see also Allan I. Mendelsohn, *Liberalism, Choice of Forum Clauses and the Hague Rules*, 2 J. MAR. L. & COM. 661 (1971).

involving a bill of lading covering an ocean shipment to or from the United States. The court acknowledged that this provision does not speak directly to a clause that simply vests a foreign court with exclusive jurisdiction, but expressed its concern that a foreign court might apply its own law. The court stated that "giving effect to such a clause is almost as objectionable as enforcing a clause subjecting the bill of lading to foreign law since, despite hortatory efforts, there would seem to be no way, save perhaps stipulation by the parties, that would bind the foreign court in its choice of applicable law."⁸⁷

The second argument of the *Indussa* court was that "from a practical standpoint, to require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small because such a clause would put 'a high hurdle' in the way of enforcing liability."⁸⁸

Other Courts of Appeals followed the *Indussa* holding⁸⁹ and extended it to arbitration clauses.⁹⁰ But in 1995, *Indussa* was in turn overruled by the Supreme Court's decision in *Sky Reefer*.

b. The *Sky Reefer* Decision

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,⁹¹ Bacchus, a New York fruit distributor, purchased fruits from a Moroccan fruit supplier. To transport the fruits Bacchus chartered the M/V *Sky Reefer*, a vessel owned by a Panamanian company, but time chartered to a Japanese carrier. The form bill of lading contained the following contract terms on its back:

(1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law.

(2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc., in ac-

⁸⁷ *Indussa*, 377 F. 2d at 203.

⁸⁸ *Id.* (internal citation omitted).

⁸⁹ See *Conklin & Garrett, Ltd. v. M/V Finnrose*, 826 F.2d 1441 (5th Cir. 1987); *Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon*, 642 F.2d 721 (4th Cir. 1981); *Underwriters at Lloyd's of London v. The M/V "Steir"*, 773 F. Supp. 523 (D.P.R. 1991); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, (8th Cir. 1986).

⁹⁰ See *State Establishment for Agric. Prod. Trading v. M/V Wesermuende*, 838 F.2d 1576 (11th Cir. 1988); *Siderius, Inc. v. M/V "Ida Prima"*, 613 F. Supp. 916 (S.D.N.Y. 1985); *Pac. Lumber & Shipping Co. v. Star Shipping A/S*, 464 F. Supp. 1314 (W.D. Wash. 1979).

⁹¹ 515 U.S. 528 (1995).

cordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.⁹²

During shipment, the cargo was damaged. The fruit distributor was compensated in part from its marine cargo insurer, Vimar Seguros y Reaseguros. Both then brought suit against the M/V Sky Reefer in rem and the Panamanian owner in personam in District Court in Massachusetts under the bill of lading, contending that the arbitration clause was invalid under COGSA. The district court granted the carrier's motion to stay the action and compel arbitration.⁹³ It then certified for interlocutory appeal the question of whether the provisions of § 1303 (8) COSGA nullifies an arbitration clause contained in a bill of lading governed by COGSA. The First Circuit held that the arbitration clause was enforceable.⁹⁴ The court assumed that a foreign arbitration clause lessens liability under COGSA, but resolved the conflict with § 3 of the Federal Arbitration Act (FAA), which requires courts to stay proceedings and enforce arbitration agreements in favor of the FAA.⁹⁵

The Supreme Court affirmed, but differed from the reasoning of the Court of Appeals by holding that COGSA does not render a forum selection clause invalid. The Court thus not only answered the narrow question of whether § 1303 (8) COGSA nullifies an arbitration clause in a bill of lading, but also rejected the entire *Indussa* holding.⁹⁶ The Court gave two reasons for its rejection. First, the Court drew a clear distinction between the lessening of liability and the increase of transaction costs of litigation. It ruled that § 1303 (8) of COGSA addresses

⁹² *Id.* at 531.

⁹³ *Vimar Seguros y Reaseguro, S.A. v. M/V Sky Reefer*, No. 91-13345WF, 1993 U.S. Dist. LEXIS 5672, at *21 (D. Mass. April 19, 1993).

⁹⁴ *Sky Reefer*, 29 F.3d 727 (1st Cir 1994).

⁹⁵ The FAA provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1994).

⁹⁶ *Sky Reefer*, 515 U.S. at 534 ("We cannot endorse the reasoning or the conclusion of the *Indussa* rule itself.").

only the *lessening* of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability.⁹⁷ According to the Court “[t]he difference is that between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated.”⁹⁸

Second, the Court stressed the meaning of uniformity in the interpretation of a statute based on a multilateral treaty. Because none of the parties to the “Hague Rules” had interpreted them to prohibit forum selection clauses, the Court declined to construe the provision in a different way.⁹⁹ The argument of the plaintiff that arbitrators in Japan would apply the Japanese version of the Hague Rules, in a manner less advantageous to plaintiffs, was rejected by the Court, concluding that the district court has retained jurisdiction over the case and “will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed.”¹⁰⁰

c. Decisions After *Sky Reefer*

The question remaining after *Sky Reefer* was whether lower courts would apply the holding to forum selection clauses as well. Cargo claimants have urged lower courts to restrict the holding of *Sky Reefer* to foreign arbitration clauses.¹⁰¹ However, it was sufficiently clear from the holding of the Supreme Court that the Court intended to overrule *Indussa* not only with respect to arbitration clauses but with respect to forum selection clauses in general.¹⁰² Federal courts have therefore not hesitated to apply *Sky Reefer* not only to arbitration clauses,¹⁰³ but to

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 536-37 (citing Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 776-96 (1987)).

¹⁰⁰ *Id.* at 540.

¹⁰¹ See Elizabeth A. Clark, *Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA*: Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 1996 BYU L. REV. 483; Gibson, *supra* note 7, at 3, 22-26.

¹⁰² Justice O'Connor only concurred in the judgment, because she declined to reject the *Indussa* rule without qualification. In her opinion it was only necessary to overrule *Indussa* “to the extent necessary to decide this case.” *Sky Reefer*, 515 U.S. at 542.

¹⁰³ *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Morewitz v. West of England Ship Owners Mut. Prot. and Indem. Ass'n (Luxembourg)*, 62 F.3d 1356 (11th Cir. 1995); *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp.

foreign forum selection clauses in bills of lading governed by COGSA.¹⁰⁴

The extension of *Sky Reefer* to forum selection clauses in bills of lading governed by COGSA, however, raises two questions. Section 1300 of COGSA provides that U.S. law must always apply in cases involving a bill of lading covering an ocean shipment to or from the United States.¹⁰⁵ Commentators have questioned whether foreign courts will apply COGSA at all or, if they do, whether they will do so in the same way as a U.S. court.¹⁰⁶

The majority in *Sky Reefer* rejected the second argument by describing it as an "insular distrust of the ability of foreign tribunals to apply the law."¹⁰⁷ This statement captures the essence of the second argument. Foreign courts, like U.S. courts, are required to apply foreign law regularly. Nobody would ever conclude that U.S. courts are not able to deal with foreign law. Such an argument undermines the whole concept of conflicts of law. In maritime law, an area that is harmonized to a remarkable extent by the Hague Rules and where often specialized courts for maritime law are designated as the proper forum,¹⁰⁸ the argument sounds even worse. Moreover, courts can use the help of expert witnesses to make sure that they apply U.S. law in the same way as U.S. courts.¹⁰⁹ Whether foreign courts will properly apply U.S. law should not really be a concern.

826 (S.D.N.Y. 1996); *Nippon Fire & Marine Ins. Co. v. M.V. Egasco Star*, 899 F. Supp. 164 (S.D.N.Y. 1995).

¹⁰⁴ *Fireman's Fund Ins. Co. v. M.V. DSR Atlantic*, 131 F.3d 1336 (9th Cir. 1998); *Mitsui & Co. (USA) v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997); *Hyundai Corp. U.S.A v. M/V An Long Jiang*, No. 92-C3855, 1998 U.S. Dist. LEXIS 254 (S.D.N.Y. Jan. 13, 1998); *TradeArbed, Inc. v. M/V Agia Sofia*, No. 96-C4930, 1997 U.S. Dist. LEXIS 23001 (D.N.J. Aug. 13, 1997); *Seven Seas Ins. Co. v. Danzas S.A.*, 1997 AM. MAR. CASES 961 (S.D. Fla. 1996); *Bison Pulp & Paper Ltd. v. M.V. Pergamos*, No. 89-C1392, 1995 U.S. Dist. LEXIS 22067 (S.D.N.Y. 1995); *Great Am. Ins. Co. v. Kapitan Byankin*, 1996 AM. MAR. CASES 2754 (N.D. CALF. 1996); *Pasztor v. Croatia Line*, 918 F. Supp. 961 (E.D. Va. 1996); *Int'l Corp. v. M/V Cast Muskox*, No. 95-C41841, 1995 U.S. Dist. LEXIS 18200 (S.D.N.Y. Dec. 8, 1995).

¹⁰⁵ In addition, § 1312 provides that "[t]his chapter shall apply to all contracts for carriage of goods by sea to or from the ports of the United States in foreign trade." 46 U.S.C. § 1312 (1994).

¹⁰⁶ See Clark, *supra* note 101, at 497.

¹⁰⁷ *Sky Reefer*, 515 U.S. at 539 (with respect to foreign arbitrators); see also Justice Moore's concurring opinion in *Indussa*, 377 F.2d 200, 205 (2d Cir. 1967) (describing the majority opinion as "outlawing any other tribunal than our own.").

¹⁰⁸ Like courts in England which have long experience in admiralty litigation.

¹⁰⁹ Even within the United States, there is no absolute uniformity as to the interpretation of COGSA, Michael F. Sturley, *Proposed Amendments to the Carriage of*

The first question—whether U.S. law will be applied at all—seems to be more important. Even though the Hague Rules have harmonized the law governing bills of lading, the law in this area is not totally standardized. For example, the limits of liability can differ significantly.¹¹⁰ The *Sky Reefer* court resolved the problem with respect to arbitration clauses by concluding that the District Court has retained jurisdiction over the case and “will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed.”¹¹¹ However, as Justice O’Connor pointed out in her concurring opinion, this is not true with respect to choice of forum clauses.¹¹²

One possible solution accepted by the Fifth Circuit in *Mitsui & Co. (USA), Inc. v. MIRA M/V* is that a choice of forum clause is supplemented by a choice of law clause designating U.S. COGSA as the applicable law.¹¹³ The court of appeals held that in such a case there is no risk that U.S. COGSA will not be applied. This conclusion is not entirely correct because the application of U.S. COGSA depends on the question whether the foreign court will enforce a choice of law clause. Therefore the party filing a motion to dismiss the case because of improper venue should be required to show that a choice of law clause will be enforced in the designated forum. If this can be shown, there is no reason to refuse the enforcement of a forum selection clause by a U.S. court.

The situation is more difficult when a forum selection clause in a bill of lading designates a foreign forum and foreign law will be applied. This would be the case either (1) because the bill of lading does not contain a choice of law provision and the choice of law rules of the designated forum do not designate U.S. COGSA as the applicable law, or (2) because the bill of lading contains a choice of law clause that does not select U.S. COGSA as the applicable law. The Supreme Court held in *Sky Reefer* that it is not necessary that COGSA itself is applied by the foreign

Goods by Sea Act, 18 HOUSTON J. INT. L. 609, 613 n.22 (1996) [hereinafter *Proposed Amendments*]. Therefore small deviations in the interpretation of the law are no argument.

¹¹⁰ See Mendelsohn, *supra* note 86, at 665.

¹¹¹ 515 U.S. at 540.

¹¹² *Id.* at 542.

¹¹³ 111 F.3d 33, 37 n.4 (5th Cir. 1997). This solution was already taken into consideration by the *Indussa* court, “there would seem to be no way, *save perhaps stipulation by the parties*, that would bind the foreign court in its choice of applicable law.” 377 F.2d at 203 (emphasis added).

court, but the "[r]elevant question . . . is whether the substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees."¹¹⁴ In other words, "a COGSA-like result must be reached."¹¹⁵

This approach is reasonable so long as maritime law is relatively uniform. It would not make a lot of sense to render a forum selection clause unenforceable by arguing that a foreign court will not apply U.S. COGSA even though it applies rules that are equivalent to U.S. COGSA.¹¹⁶ However, uniformity in maritime law with respect to bills of lading is shrinking. Consequently, U.S. courts examine foreign maritime law with respect to a specific case. This leads to additional litigation. Therefore the question has to be asked whether under the current approach a forum selection clause in a bill of lading can still fulfill the task of reducing uncertainty concerning jurisdiction.

So far, the question whether the foreign substantive law to be applied will reduce the carrier's obligations to the cargo owner below what COGSA guarantees has not been litigated heavily.¹¹⁷ In some cases, the court did not have to perform the corresponding analysis¹¹⁸ because the plaintiff did not prove that the applicable substantive law reduces the obligations of the defendant below what COGSA guarantees.¹¹⁹

¹¹⁴ 515 U.S. at 539.

¹¹⁵ Gibson, *supra* note 7, at 26.

¹¹⁶ Other commentators argue that because COGSA governs as a matter of law it should never be acceptable to apply foreign law, even if the applicable foreign law is identical to U.S. COGSA. *Id.* at 27.

¹¹⁷ A situation where foreign substantive law will reduce the carrier's obligations to the cargo owner below what COGSA guarantees can arise when the foreign law has incorporated the Visby-Amendments to the Hague Rules. Even though the Visby-Amendments have increased the liability limits, they decrease a carrier's responsibility in some cases in contravention of the Hague Rules. See William Tetley, *Limitation, Non-Responsibility and Disclaimer Clauses*, 11 MAR. LAWYER 203, 225 (1986).

¹¹⁸ But see *The Nippon Fire & Marine Ins. Co. v. M/V Coral Halo*, No. 99-1242, 2000 U.S. Dist. LEXIS 1548 (E.D.La. Feb.11, 2000) (containing analysis of Japanese and U.S COGSA). Ironically, in some instances the forum selection clause may allow the application of the Visby Amendments, which have limits and terms of liability more favorable to cargo owners than the Hague Rules and U.S. COGSA.

¹¹⁹ *Jewel Seafoods Ltd. v. M/V Peace River*, 39 F. Supp. 2d 628 (D.S.C. 1999) (concerning forum selection clause designating the People's Republic of China as the exclusive forum); *Asoma Corp. v M/V Southgate*, No. 98-C7407, 1999 U.S. Dist. LEXIS 18974. (S.D.N.Y. 1999) (concerning forum selection clause designating Korea as the exclusive forum).

In *Fireman's Fund Ins. Co. v. M/V. DSR Atlantic*,¹²⁰ the District Court for the Northern District of California held that because Korean law did not allow suit against a vessel in rem, the plaintiff would be denied a right to pursue its statutory remedies. Therefore, the district court refused to enforce the forum selection clause in a bill of lading and denied appellants' motion to dismiss for lack of jurisdiction. The Court of Appeals, however, reversed, ruling that "the mere unavailability of in rem proceedings does not constitute a 'lessening of the specific liability imposed by COGSA, rather it presents a question of the means. . . of enforcing that liability.'"¹²¹

d. Discussion

The important policy issue underlying the cases dealing with forum selection clauses in bills of lading is whether it is perceived as necessary to protect cargo owners against exclusive forum selection clauses designating a foreign forum. The foreign forum in most cases is the place where the carrier has his principal place of business. The *Indussa* court obviously found it necessary in 1967 to protect cargo owners and used § 1303 (8) COGSA as a tool to reach this goal by ruling that forum selection clauses lessen the liability of carriers. *Sky Reefer* therefore had to address the issue whether the wording of § 1303 (8) COGSA supports the holding that arbitration and forum selection clauses lessen the liability of a carrier.

A textual interpretation of § 1303 (8) COGSA and the identical Article 3 (8) of the Hague Rules, however, do not support the *Indussa* holding. The wording of § 1303 (8) of COGSA addresses the lessening of liability of the carrier and not about the lessening of the amount of damages the cargo owner can recover after deducting litigation expenses. Countries that have ratified the Hague Convention and where the legislature thought it necessary to protect the interests of cargo owners have therefore adopted special provisions in their versions of COGSA specifically to render forum selection clauses invalid.¹²²

¹²⁰ 131 F.3d 1336 (9th Cir. 1998).

¹²¹ *Id.* at 1339-40 (quoting *Sky Reefer*, 515 U.S. at 537).

¹²² For example, § 9(2) of the Australian Sea Carriage of Goods Act (1924) provides:

Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Court of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any

The Supreme Court therefore correctly refused to accept that expenses incurred for litigation and arbitration abroad "lessen the liability" of a carrier. In light of the fact that U.S. courts in many areas already construe COGSA in a way that is different from the international understanding of the Hague Rules,¹²³ it is to be welcomed that the Court stressed the importance of uniform interpretation of an international convention like the Hague Rules.

The crucial question remains: was the *Indussa* court correct in its assessment that cargo owners should be protected against exclusive forum selection clauses designating a foreign forum. In light of *Carnival Cruise* and *Effron*, it is clear that no argument can be made that such clauses are unreasonable or against public policy. Courts will therefore not declare such clauses unenforceable. Hence, if it is perceived that the *Sky Reefer* solution is inadequate, the law must be changed by the legislature.

Initially one could argue that cargo owners are sophisticated businessmen¹²⁴ and that there is no reason to protect them at all. But looking at the realities of the carriage of goods by sea, one might have doubts whether this position is correct. A contract of carriage is concluded between a carrier and a shipper. After receipt of the goods from the shipper, the carrier presents a standardized bill of lading.¹²⁵ The carrier regularly includes in the bill of lading an exclusive forum selection clause designating a forum in the country where the carrier has his principal place of business.¹²⁶

The bill of lading acts as a receipt, a contract of carriage, and a document of title.¹²⁷ The shipper forwards the bill of lading to

place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

UN-Doc., TD/B/C.4/ISL/6, at 112. See also *Proposed Amendments*, *supra* note 109, at 658.

¹²³ See *Proposed Amendment*, *supra* note 109, at 611-13.

¹²⁴ See *Sky Reefer*, No. C.I.V.A.91-13345, 1993 WL 137483, at *3 (D. Mass. 1993) ("Plaintiff [Bacchus] is evidently neither unsophisticated and unfamiliar with the negotiation of maritime shipping transactions, nor a party of relatively weak bargaining power.") (Judge Wolf); see also *Carman Tool & Abrasives v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989) (suggesting that shippers and cargo underwriters are sophisticated people).

¹²⁵ Some argue that standardized bills of lading are in fact adhesion contracts. See Gibson, *supra* note 7, at 9; see also *Sky Reefer*, 29 F.3d at 731 n.4 (indicating that a maritime bill of lading might be an adhesion contract).

¹²⁶ See "CONLINE" bill of lading of the Baltic and International Maritime Conference, U.N. Doc. TD/B/C.4/ISL/6 Annex 3 at 14.

¹²⁷ See Tetley, *supra* note 79.

a bank, which acts as an agent for the consignee. In exchange for forwarding the bill of lading, he receives either cash or a bill of exchange.¹²⁸ Once the shipper has received his money, he will not have any interest in suing the carrier because loss and damage of goods are now the risk of the consignee.¹²⁹ The consignee receives the bill of lading from his bank in exchange for the money owed to the bank and a commission. When the goods arrive at the port of discharge and some damage has occurred, the forum selection clause is therefore disadvantageous only to the consignee¹³⁰ who did not participate in the negotiation or conclusion of the contract with the carrier. If the carrier is not willing to compensate the consignee for the damage that occurred, in practice—and in the presence of a forum selection clause—the consignee must file suit at the place where the carrier has his principal place of business. The fact that so many bills of lading contain an exclusive forum selection clause designating the principal place of business of the carrier as the exclusive forum is an indication that consignees obviously have no bargaining power to change the terms in bills of lading.

Cargo owners advance the argument that the costs involved in litigation abroad are so high, especially when the damage is relatively low, that a forum selection clause designating a foreign forum effectively bars the recovery of damages. Moreover, the necessity to retain a foreign lawyer and to translate documents places additional hurdles in the way of enforcing liability abroad.¹³¹ Additionally, litigation abroad leads to practical problems. In cases where damage occurred in connection with the loading or unloading of goods, proof is best available at the forum of the port of loading or discharge, which in most cases is not the principal place of business of the carrier.¹³²

On the other hand, litigation abroad does not always have to be more expensive than inside the United States. U.S. claimants sometimes have much higher litigation expenses within the United States than abroad. The court provided the example

¹²⁸ For an explanation of the operation of documentary credits, see PAUL TODD, *BILLS OF LADING AND BANKERS' DOCUMENTARY CREDITS* (1993).

¹²⁹ It is therefore questionable whether it is necessary to be concerned about the inequality of bargaining power between the shipper and the carrier, as Justice Stevens expressed in his dissent in *Sky Reefer* 515 U.S. at 550.

¹³⁰ Jürgen Basedow, *Das forum conveniens der Reeder im EuGVÜ*, IPRAX 133 (1985).

¹³¹ *Id.* at 134.

¹³² See Wetterstein, *supra* note 4, at 329.

that for a claimant in Seattle, travel expenses to Vancouver are lower than to New York.¹³³ Counsel fees can sometimes be lower abroad, litigation can be faster, and in many countries the winning party can recover litigation expenses. Moreover, the argument that the high costs of litigation abroad will prevent cargo owners from enforcing their rights is only true when the cargo was not insured. If the cargo was insured, as most maritime cargo is, the cargo owner recovers from the insurance company. The insurance company most likely is, or should be, accustomed to litigation abroad.¹³⁴

In addition, the interests of carriers should also be taken into account. During a voyage, a vessel often has contact with several seaports. Without a forum selection clause, the carrier is subjected to the risk that he has to litigate in different fora. To be sure, carriers have, or should have, lawyers in all ports where they load or unload. But in any case, the answer to the question whether it is necessary to protect only cargo owners is not an easy one. As a result, new legislative initiatives in the United States are now recommending greater protection of cargo owners.

e. Legislative Initiatives: The Proposed New U.S. Senate COGSA '99

In 1993, the U.S. Maritime Law Association (MLA) started to work on a draft for a new U.S. COGSA, which was presented to the public in 1996.¹³⁵ In particular, the provisions of the MLA proposal concerning forum selection clauses have been discussed fiercely among U.S. and foreign lawyers¹³⁶ and has called forth much concern by a number of organizations interested in

¹³³ *Sky Reefer*, 515 U.S. at 536.

¹³⁴ See Soo Sandra Jin Lee, *Is Sky Reefer in Jeopardy? The MLA's Proposed Changes to Maritime Foreign Arbitration Clauses*, 72 WASH. L. REV. 625, 646 (1997).

¹³⁵ The progress of the proposed legislation is documented by William Tetley, *The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law*, 30 J. MAR. L. & COM. 595 (1999); *Proposed Amendments*, *supra* note 109; Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553 (1995).

¹³⁶ See Regina Asariotis & Michael N. Tsimplis, *The Proposed U.S. Carriage of Goods by Sea Act*, 1999 LMCLQ 126; Michael F. Sturley, *Proposed Amendments to the U.S. Carriage of Goods by Sea Act: A Response To English Criticisms*, 1999 LMCLQ 519; Regina Asariotis and Michael N. Tsimplis, *Proposed Amendments to the U.S. Carriage of Goods by Sea Act: A Reply To Professor Sturley's Response*, 1999 LMCLQ 530; Tetley, *supra* note 135, at 620-22. For a discussion of the original MLA draft, see Soo Sandra Jin Lee, *supra* note 134, at 643 and *Proposed Amendments*, *supra* note 109 at 613.

the shipping industry.¹³⁷ With respect to the question of validity and enforceability of forum selection clauses in bills of lading, the MLA draft provided the following:

Any clause, covenant, or agreement made before a claim has arisen that specifies a foreign forum for litigation or arbitration of a dispute governed by this Act shall be null and void and of no effect if:

- (i) the port of loading or the port of discharge is or was intended to be in the United States; or
- (ii) the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is or was intended to be in the United States;

provided, however, that if a clause, covenant, or agreement made before a claim has arisen specifies a foreign forum for arbitration of a dispute governed by this Act, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.¹³⁸

The MLA proposal has been presented to the U.S. Senate's Sub-Committee on Surface Transportation and Merchant Marine and has been amended several times. It is not clear which version is most likely to prevail. The latest draft known as "Senate COGSA '99" is dated as of September 24, 1999.¹³⁹ With respect to forum selection clauses, Senate COGSA '99 provides in § 7 (i)(2) the following:

"Notwithstanding a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies, a party to the contract or agreement, at its option, may commence such litigation or arbitration *in any appropriate forum in the United States* if one or more of the following conditions exist:

- i) The port of loading or the port of discharge is, or was intended to be in the United States, or
- ii) The place where the goods are received by a carrier or the place where the goods are delivered to a person au-

¹³⁷ Concern has been expressed by BIMCO, FIATA, the International Group of P & I. Clubs, the International Shipping Group and the European Commission. See Regina Asariotis and Michael N. Tsimplis, *Proposed Amendments to the U.S. Carriage of Goods by Sea Act: A Reply To Professor Sturley's Response*, 1999 LMCLQ 530, 532.

¹³⁸ MLA draft proposal, *reprinted in* Sturley, *supra* note 107, at 662-83.

¹³⁹ William Tetley, "Staff Working Draft of Senate COGSA 99" at <http://www.admiraltylaw.com/tetley/cogsa99.html> (Sept. 24, 1999) [hereinafter COGSA 99].

- thorized to receive them is, or was intended to be in the United States, or
- iii) The principal place of business or, in absence thereof, the habitual residence of the defendant is in the United States, or
 - iv) The place where the contract was made is in the United States, or
 - v) A forum specified for litigation or arbitration under a provision in the contract of carriage or other agreement is in the United States.

The MLA proposal and § 7 (i) (2) of COGSA '99 have the effect that, notwithstanding an exclusive forum selection clause in a bill of lading designating a foreign forum, both parties to the contract can nevertheless file suit in the United States. The requirements are that the contract must have certain connections with the United States. The practical result of both provisions is that if one party files suit in the U.S. and the other party, relying on the exclusive forum selection clause, files a motion to dismiss because of improper venue, a U.S. court must deny the motion. The motion must be denied because the U.S. is a proper forum under the legislation in spite of the exclusive forum selection clause in the bill of lading. Both proposals therefore overturn the *Sky Reefer* decision.

The difference between the MLA proposal and the U.S. Senate COGSA '99 is that U.S. COGSA '99 specifies additional circumstances that open U.S. courts to a plaintiff. Moreover, the MLA proposal renders a forum selection clause null and void, while U.S. Senate COGSA '99 does not have this effect. The plaintiff can still file suit according to the contractually designated forum. An existing exclusive forum selection clause therefore becomes in fact a permissive forum selection clause. In practice, however, a U.S. plaintiff will most probably use the options provided by Senate COGSA '99.

To declare a forum selection clause null and void has the result that a foreign judgment would not be enforceable in the United States because the foreign court lacks jurisdiction according to U.S. standards.¹⁴⁰ This problem is resolved in the U.S. COGSA '99 proposal. Because U.S. COGSA '99 does not declare the United States as being the exclusive jurisdiction, a foreign judgment can be enforced in the United States. This

¹⁴⁰ See Asariotis & Tsimplis, *supra* note 137, at 138; see also *Hilton v. Guyot*, 159 U.S. 113 (1985); *Mercandino v. Devoe & Reynolds, Inc.*, 436 A.2d 942 (N.J. Super. Ct. App. Div. 1981).

approach is reasonable. The interests of cargo owners are protected in U.S. COGSA '99 by giving them the option to file suit in the United States. This goal can be reached without making foreign judgments unenforceable. U.S. COGSA '99 is therefore the better proposal.

Another concern expressed by commentators was that a U.S. judgment in breach of a foreign jurisdiction agreement might not be enforceable abroad.¹⁴¹ This may be true and can lead to practical difficulties. However, the question whether cargo owners should be protected against forum selection clauses and whether U.S. courts should have jurisdiction can not depend on whether a U.S. judgment is enforceable abroad. Moreover, and specifically in maritime law, a judgment against a carrier can often be enforced in rem against a vessel which lies in a U.S. port. In any event, the MLA proposal and U.S. Senate COGSA '99 protect the interests of U.S. cargo claimants who can file suit in the United States, despite an exclusive forum selection agreement designating an exclusive foreign forum.

The foregoing has outlined the current state of U.S. law with respect to forum selection clauses in form passenger contracts and bills of lading. With respect to both maritime contracts, forum selection clauses are generally accepted by courts in the United States. If Senate COGSA '99, however, becomes reality, the result will be that cargo owners are protected from exclusive forum selection clauses in bills of lading covering transportation to or from the U.S. *while passengers are not*. Neither the MLA proposal, nor Senate COGSA '99, nor any other statutory initiative proposes to revive the amendments made in the 1992 Oceans Act with respect to passenger contracts and overturn *Carnival Cruise*.

Before a final evaluation of the current U.S. law and the current propositions of the MLA and Senate COGSA '99 will be made, this article will attempt to put the current U.S. law and the current proposals in an international context to examine what kind of solutions can be found in other jurisdictions and in international conventions concerning transportation law.

¹⁴¹ See Asariotis & Tsimplis, *supra* note 137, at 139.

III. AN INTERNATIONAL VIEW ON FORUM SELECTION CLAUSES

Examining international conventions in transportation law and the law in other jurisdictions, it can be stated that the approach toward forum selection clauses in general and in maritime law in particular differs from the current U.S. approach.

A. INTERNATIONAL CONVENTIONS IN TRANSPORTATION LAW

Transportation is an international business. It has therefore always been recognized that uniformity in transportation law, especially in maritime and aviation law, is desirable. In both areas, international conventions have been established to achieve the goal of uniformity. Conventions in maritime and aviation law have influenced each other. Therefore, this article discusses not only international maritime conventions, but also international conventions in aviation law. Moreover, aviation law is important because an argument can be made that transportation of passengers and goods by sea or by air is not so fundamentally different as to justify different approaches in both areas with respect to forum selection agreements.

1. *International Conventions Concerning The Carriage of Passengers And Goods By Air*

In aviation law there is a long tradition of multilateral treaties designed to develop uniform rules governing air transportation in an international setting. The principal piece of legislation on international aviation law is the Warsaw Convention,¹⁴² adopted in 1929 and ratified by the United States in 1934.¹⁴³ The Warsaw Convention governs the liability of air carriers for accidents in international carriage by air. According to Article 1 (1), the Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire. . . [and] equally to gratuitous transportation by aircraft performed by an air transportation enterprise."¹⁴⁴ The Convention introduced uniform rules with respect to transportation documentation—

¹⁴² Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 U.S.C. app. § 40105 (1994) (adherence of the United States proclaimed Oct. 29, 1934).

¹⁴³ For the history of the Warsaw Convention, see ANDREAS F. LOWENFELD, AVIATION LAW CASES AND MATERIALS (2d ed. 1981); see also Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499 (1967).

¹⁴⁴ 49 U.S.C. § 40.05 (1994).

such as passenger tickets, baggage checks, and air waybills; the duties and rights of contracting parties; and a statute of limitations. Moreover, the Convention specifically defines in which fora suit can be brought. The right of the plaintiff to file suit in one of these fora cannot be restricted before the damage occurs.¹⁴⁵ With respect to the rules of jurisdiction, the Warsaw Convention makes no difference between passenger contracts and contracts for the transportation of goods.

Article 28 (1) of the Warsaw Convention provides four options where a plaintiff may bring an action for damages: (1) the domicile of the carrier; (2) the carrier's principle place of business; (3) the carrier's place of business through which the contract for travel was made; or (4) the place of destination.¹⁴⁶ One possible forum was not mentioned in this list, the passenger's domicile or permanent residence (the so-called "fifth forum"). The result was that U.S. citizens sometimes had to file suit in foreign courts even though the carrier involved had sufficient contact with the United States to be subjected to personal jurisdiction in the United States. Commentators were not the only ones who perceived this result as unfair.¹⁴⁷ The U.S. government was equally concerned that the system would be disadvantageous to U.S. citizens. It was argued that because special conditions of U.S. litigation make it more favorable for a U.S. plaintiff to file suit in the United States than abroad,¹⁴⁸ a U.S. plaintiff should have the ability to file suit in the United States.

¹⁴⁵ "Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void." *Id.* Agreements that provide additional fora where the plaintiff can file suit are, however, possible. See Allan I. Mendelsohn, *The Warsaw Convention and Where We Are Today*, 62 J. AIR L. & COM. 1071, 1076 (1997); Warren L. Dean, Jr., *Restructuring the Warsaw Right to Recover*, 1089 *Aviation Law Reports* § 23,904 (1996).

¹⁴⁶ For a detailed analysis of Article 28, see James L. Baudino, *Venue Issues Against Negligent Carriers—International and Domestic Travel: The Plaintiffs's Choice?*, 62 J. AIR L. & COM. 163 (1996).

¹⁴⁷ See Allan I. Mendelsohn, *A Conflict of Laws: Approach to the Warsaw Convention*, 33 J. AIR L. & COM. 624, 630 (1967); Dean *supra*, note 145.

¹⁴⁸ The following factors make U.S. courts attractive for plaintiffs. Juries of lay men and women are often remarkably pro-plaintiff. Moreover, procedural aspects of U.S. litigation tend to favor the plaintiff. Such pro-plaintiff aspects include: the availability of contingency fee arrangements; the fact that unsuccessful litigants are not ordinarily liable for their adversary's attorneys' fees; the broad discovery proceedings in the U.S.; and U.S. damage awards, which tend to be dramatically higher than those in other countries. See Born, *supra* note 1, at 4; see also Lee S. Kreindler, *The IATA Solution*, 14 LLOYD'S AVIATION L. 6 (1995) (stating

The first international convention in transportation law that provided something similar to the fifth forum was a maritime convention, the "International Convention for the Unification Of Certain Rules Relating To Carriage Of Passengers' Luggage By Sea" from 1967.¹⁴⁹ Article 13¹⁵⁰ specified exclusive fora that could be designated by a forum selection agreement prior to the occurrence of the incident that causes the loss or damage. One accepted forum was the Court of the State of the *domicile or permanent place of residence* of the claimant if the defendant had a place of business and was subject to jurisdiction in that State.¹⁵¹

Using Article 13 (1)(c) of the Brussels luggage convention as a model, an initial attempt to include the fifth forum into the Warsaw system was made in the 1971 Guatemala Protocol.¹⁵² A second attempt was made in the 1975 Montreal Additional Protocol No. 3.¹⁵³ But neither protocol ever went into force. On May 28, 1999, however, the United States signed the "new" War-

that "frequently venue is more important in determining damages than the substantive law applied"); Andreas F. Lowenfeld, *A Postscript and Warning*, 21 AIR & SPACE L. 187, 188 (1996).

¹⁴⁹ International Convention For The Unification Of Certain Rules Relating To Carriage Of Passengers' Luggage By Sea, Brussels, May 27, 1967 [hereinafter Luggage Act] *reprinted* in BENEDICT ON ADMIRALTY, at 2-50 (rev. 7th ed. 1993). See Mendelsohn, *supra* note 86, at 667.

¹⁵⁰ Article 13 contains the following provision:

Prior to the occurrence of the incident which causes the loss or damage, the parties to the contract of carriage may agree that the claimant shall have the right to maintain an action for damages, according to his preference, only before:

- 1) the Court of the permanent residence or principal place of business of the defendant, or by the Court of the place of departure or that of destination according to the contract of carriage; or
- 2) the Court of the State of the domicile or permanent place of residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that State.

Any contractual provision that restricts the claimant's choice of jurisdiction beyond that permitted under paragraph (1) shall be null and void.

Luggage Act, *supra* note 149, at 2-53, 54.

¹⁵¹ The 1961 luggage convention is phrased in a unique fashion, suggesting that if a carrier includes a choice of forum clause in its form ticket, that clause must provide the passenger with a choice among the listed fora. But Article 13 of the luggage convention does not appear to require the carrier to include a choice of forum clause in its ticket. *Id.*

¹⁵² Protocol To Amend The Convention For The Unification of Certain Rules Relating To International Carriage by Air Signed At Warsaw on October 12, 1929, ICAO Doc. 8932.

¹⁵³ *Id.*

saw Convention, the 1999 Montreal Convention.¹⁵⁴ Article 33 (1) of "Montreal 1999," provides the plaintiff the option of suing in one of the Article 28 (1) fora of the Warsaw Convention. In addition, Article 33 (2) provides: "in respect of damages resulting from the death or injury of a passenger, an action may be brought . . . in the territory of a State Party in which at the time of the accident the passenger has *his or her principal and permanent residence* and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air . . ."¹⁵⁵ If goods have been damaged, the fifth forum is not available. Like the jurisdiction provisions in the 1929 Warsaw Convention, the jurisdiction provisions in Montreal 1999 cannot be restricted by agreement.¹⁵⁶

Thus, with respect to passenger transportation by air it is now internationally accepted that a passenger should have the option to file suit in the country where he has his principal and permanent residence if the carrier has certain contacts with that country. Such a solution balances the interests of passengers and carriers. Passengers can file suit where they live but only if the carrier does business there. This requirement avoids carriers being subject to jurisdiction in a fora with which they have no connection at all.

2. *International Conventions Concerning The Carriage of Passengers And Goods By Sea*

In maritime law, as in aviation law, there is a long tradition of multilateral treaties designed to develop uniform rules governing maritime transportation in an international setting. Unlike in aviation law, however, there exist different conventions concerning the carriage of passengers and the carriage of goods.

¹⁵⁴ Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on 28 May 1999.

¹⁵⁵ *Id.* (emphasis added). Principal and permanent residence is defined in Art 33 (3)(b) as "the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be a determining factor in this regard." *Id.*

¹⁵⁶ Article 49 of the Montreal Convention states: "Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void." *Id.*

a. International Maritime Conventions Concerning the Carriage of Passengers By Sea

In an attempt to create a "Warsaw Convention" for the carriage of passengers by sea, two conventions have been drafted so far. Neither has received the same acceptance as the Warsaw Convention and neither has been signed or ratified by the United States. They did not fail to gain acceptance, however, because of their jurisdiction provisions. Rather the liability limits were perceived as far too low.¹⁵⁷ But the solutions, which can be found in both conventions with respect to forum selection agreements, were generally acceptable at the time the conventions were drafted.

In 1961, the Comité Maritime International (CMI) presented the first international convention concerning the carriage of passengers: the "International Convention for the Unification of Certain Rules Relating To The Carriage of Passengers by Sea" (Brussels Convention 1961).¹⁵⁸ This so-called Brussels Convention 1961 was the maritime equivalent of the 1929 Warsaw Convention and was colloquially known as "Little Warsaw." But with respect to jurisdiction, the 1961 Brussels Convention differed from the 1929 Warsaw Convention. Unlike Article 28 of the Warsaw Convention, "Brussels 1961" did not specify certain fora where, at the option of the plaintiff, suit could be filed. The only provision with regard to jurisdiction in "Brussels 1961" was

¹⁵⁷ According to Article 6 of the Brussels Convention Relating To The Carriage of Passengers by Sea, the liability of the carrier for the death of or personal injury of a passenger shall in no case exceed 250,000 francs (approximately US \$ 16,600). According to Article 7 (1) of the 1974 Athens Convention, the liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 700,000 francs (approximately US \$ 45,000) per carriage. In 1990, the liability limits of the Athens Convention were raised to 175,000 Special Drawing Rights (approximately US \$ 175,000). See Protocol to Amend the Athens Convention Relating to the Carriage Of Passengers And Their Luggage By Sea, London, March 29, 1990, *reprinted in* BENEDICT ON ADMIRALTY, doc. 2-3A, at 2-22.7.

¹⁵⁸ BENEDICT ON ADMIRALTY, doc. 2-1 at 2-2 (rev. 7th ed. 1993). The scope of the convention was defined in Article 2, which stated that the Convention applies to any "international carriage" if either the ship flies the flag of a Contracting State or if, according to the contract of carriage, either the place of departure or the place of destination is in a Contracting State. International carriage was defined as carriage in which according to the contract of carriage the place of departure and the place of destination are situated either in a single State if there is an intermediate port of call in another State, or in two different States.

Article 9, which declared all forum selection and arbitration clauses in passenger contracts to be "null and void."¹⁵⁹

The shipping nations of the world¹⁶⁰ did not ratify "Brussels 1961," reportedly because they believed that a convention concerning the carriage of passengers should deal with luggage as well.¹⁶¹ But even when a luggage convention was drafted in 1967¹⁶², none of the shipping nations ratified it. Therefore, the 1961 Brussels Convention and its Article 9 are today only of historical interest.

In 1974, on the basis of the existing CMI conventions, the International Maritime Organization (IMO)¹⁶³ convened a conference in Athens to create a uniform liability regime in the area of the carriage of passengers and their luggage. The result of the conference was the "Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea of 1974."¹⁶⁴ The Athens Convention took a different approach than the Brussels Convention with respect to forum selection provisions. Like the Warsaw Convention, "Athens 1974" provided several options for the plaintiff to file suit while declaring invalid any provision that restricted the options by contract.¹⁶⁵ The options of the claimant were specified in Article 17 (1),¹⁶⁶ which provided that, if the Court is located in a State Party to the Convention, the claimant has the option to file suit in (a) the Court of the place of permanent residence or principal place of business of the defendant, (b) the Court of the place of departure or that of the destination according to the contract of carriage, (c) a court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or (d) a court of the State where the

¹⁵⁹ Article 9 states that "Any contractual provision . . . purporting to require disputes to be submitted to any particular jurisdiction or arbitration, shall be null and void, but the nullity of that provision shall not render void the contract which shall remain subject to the provisions of this Convention." *Id.*

¹⁶⁰ The convention is in force only in ten countries.

¹⁶¹ ROLF HERBER, *SEEHANDELSRECHT* 37 (1999).

¹⁶² Luggage Act, *see supra* note 149, at 2-53.

¹⁶³ While the Comité Maritime International is a private organization situated in Antwerp, the International Maritime Organization (www.imo.org), situated in London, is a special organization of the United Nations. IMO was originally called the Inter-Governmental Consultative Organization (IMCO), but the name was changed in IMO in 1982.

¹⁶⁴ BENEDICT ON ADMIRALTY, doc. 2-2 at 2-9.

¹⁶⁵ Article 18: "Any contractual provision . . . having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void." *Id.* at 2-17.

¹⁶⁶ Source on file with the author.

contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State. Article 17 (2) of the Convention allows forum selection and arbitration clauses, after the occurrence of the incident that has caused the damage. "Athens 1974" has been in force since April 1987.¹⁶⁷ So far, twenty states are parties.¹⁶⁸

If Article 17 (1) of "Athens 1974" would have the same worldwide acceptance as the Warsaw Convention, and if it would have been applicable in U.S. courts, the outcome in *Effron v. Sun Life Cruise, Inc.* would have been different. Mrs. Effron could have brought suit in the United States. Assuming that U.S. courts would construe Article 17 (1) of the Athens Convention in the same way they have construed Article 28 (1) of Warsaw, the contract between Mrs. Effron and Sun Line Greek would have been deemed to have been made in the United States, most probably in New York through the offices of Sun Line Cruises. The New York office would have been "a place of business through which the contract was made,"¹⁶⁹ and, consequently, where Sun Lines Greek would have been subject to U.S. jurisdiction.¹⁷⁰ Moreover, Mrs. Effron had her domicile or permanent residence in the United States. Accordingly, under Article 17 (1) of "Athens 1974," she could have brought suit in the United States.

Because the places specified in Article 28 of Warsaw have been construed by courts (like the places specified in provisions like Article 17 (1) of "Athens 1974") to refer to the Contracting Parties, not to specific areas within a particular Contracting Party, the country's internal law and not the Convention governs the plaintiff's choice of forum within that country.¹⁷¹ Where in the United States Mrs. Effron could have brought suit would therefore be a question of U.S. procedural law. Most importantly, no matter what the result might be, Mrs. Effron would

¹⁶⁷ See *Summary of Status of Conventions* at <http://www.imo.org/convent/summary.htm>. (Sept. 30, 2000).

¹⁶⁸ Herber, *supra* note 161, at 40.

¹⁶⁹ It seems reasonable to construe Article 17 (1)(d) in the same way as Article 28(1) of the Warsaw Convention was construed in *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804 (2d Cir. 1966). The court held that a foreign airline had acted as an agent of United Arab Airlines and the United States was sufficient to be a place where the contract was formed. See Baudino, *supra* note 146, at 173.

¹⁷⁰ Athens Convention, Art. 17 (1)(d).

¹⁷¹ *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965) (stating that "the U.S. certainly did not indicate that it understood that the Warsaw Convention would have any impact upon the rules governing the choice of forum within the federal system, or among the various states.").

have been protected against being required to file suit in Greece. It is difficult to understand why passengers on cruise lines should be treated differently from passengers on airplanes.

In a case like *Carnival Cruise*, however, a ratification by the U.S. of a convention like "Athens 1974" might well not change the outcome of the case. As already mentioned, the plaintiff's choice of forum within a country is governed by the internal law of that country, not by the Convention. Therefore, even if a convention like "Athens 1974" were in force in the U.S., cruise line companies like Carnival could still include forum selection clauses in their passenger tickets designating Florida as the exclusive forum, because the internal law of the U.S. presumably enforces such clauses. Moreover, the fact that the plaintiff has the *option* under the convention to file suit in several specified fora may not change this conclusion. By waiving his right to file suit in fora other than the forum specified in the exclusive forum selection clause, the plaintiff does not waive a right given to him by the convention. The participation of the United States in an international convention like "Athens 1974" would thus not necessarily protect passengers like Mrs. Shute from exclusive forum selection clauses designating a forum within the United States.

b. International Maritime Conventions Concerning The Carriage of Goods By Sea

In the area of the carriage of goods by sea, three international conventions exist: the "Hague Rules",¹⁷² the "Visby Amendments" to the Hague Rules,¹⁷³ and the "Hamburg Rules."¹⁷⁴ The goal of all three conventions is to create uniformity in maritime

¹⁷² International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, August 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted* in BENEDICT ON ADMIRALTY, doc. 1-1 at 1-2.1 (rev. 7th ed. 1993). For the history of the Hague Rules, see Michael F. Sturley, *The History of COGSA and the Hague Rules* 22, J. MAR. L. & COM. 1 (1991) [hereinafter History of COGSA].

¹⁷³ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, February 23, 1968, *reprinted* in BENEDICT ON ADMIRALTY doc. 1-2, at 1-25 (rev. 7th ed. 1993).

¹⁷⁴ United Nations Convention on the Carriage of Goods by Sea, adopted at Hamburg, March 31, 1978, *reprinted* in BENEDICT ON ADMIRALTY, doc. 1-3, at 1-32.6 (rev. 7th ed 1993).

The Hague Rules and the 1968 protocol were criticized especially by developing countries, which felt that both conventions did not reflect their interests. Therefore, the United Nations Commissions on International Trade Law (UNCITRAL) worked out a detailed study and drafted a new convention that was

law because a lack of uniformity imposes costs on the shipping industry.¹⁷⁵ The United States has ratified only the Hague Rules¹⁷⁶ and has adopted them as the Carriage of Goods by Sea Act.¹⁷⁷

Neither the Hague Rules nor the Visby Amendments contain provisions dealing with jurisdiction. The Supreme Court acknowledged this in *Sky Reefer* by holding that § 1303 (8) COGSA, a provision identical to Article 3 (8) of the Hague Rules, does not invalidate forum selection clauses because such clauses do not lessen the liability of carriers.¹⁷⁸ Hence, uniformity concerning jurisdiction was not a goal of the Hague Rules or the Visby Amendments. The issue of whether forum selection clauses were enforceable was simply left to national law.¹⁷⁹

However, a different approach was taken when the Hamburg Rules were drafted. The Hamburg Rules were drafted as a reaction to criticism—in particular by developing countries—that the Hague Rules and the Visby Amendments were too favorable to carriers. With respect to forum selection agreements, representatives of most developing countries expressed their view that the Hamburg Rules should restrict the enforceability of forum selection agreements.¹⁸⁰ The reason for this position was that

adopted at a conference at Hamburg. SAMIR MANKABADY, *INTERNATIONAL SHIPPING LAW* II 29 (1991).

¹⁷⁵ See Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM., 553, 558 (1995) [hereinafter *Uniformity*].

¹⁷⁶ For a discussion on the reasons that the United States ratified only the Hague Rules, see Allan I. Mendelsohn, *Why The U.S. Did Not Ratify the Visby Amendments*, 23 J. MAR. L. & COM. 29 (1992). For an overview which countries have ratified the Hague Rules, the Visby Amendments, and the Hamburg Rules, see BENEDICT ON ADMIRALTY, doc. 1-3A at 1-57.

¹⁷⁷ See Mendelsohn, *supra* note 176, at 23.

¹⁷⁸ See *id.* at. 25-7.

¹⁷⁹ *Proposed Amendments*, *supra* note 109, at 657.

¹⁸⁰ Report of the Working Group on International Shipping Legislation on its Second Session, U.N. Doc.TD/B/C.4/ISL/8. "The representatives of most developing countries stated that considerable loss and hardship was caused to their cargo interests by the insertion of unfair jurisdiction clauses The representatives of a few developed market economy countries felt that cargo owner should be free to choose the law and venues of litigation." *Id.* For the Canadian point of view, see, William Tetley, *Canadian Comments on the Proposed Uncitral Rules: An Analysis of the Proposed Uncitral Text*, 9 J. MAR. L. & COM. 251, 252 (1978), "Canada is a nation of importers and exporters, of shippers and consignees, but not a carrier nation in ocean trade." *Id.* He describes the jurisdiction provisions in the UNCITRAL proposal as useful to both cargo interests and carriers and as an advantage to Canadian business that, at present, can be forced to go to an unfavorable forum in a distant country. *Id.* See also William Tetley, *The Hamburg Rules—A*

most developing countries did not have a shipping fleet to import and export their goods. Rather, they relied on foreign flag vessels. These countries were therefore interested in protecting all consignees whether shippers or consignees. On the other hand, countries that carried most of their goods on their own ships, favored rules allowing forum selection agreements.

The view of those countries seeking to protect consignees from forum selection clauses prevailed. Article 21 (1) of the Hamburg Rules specifies fora where the plaintiff at his option can file suit. The plaintiff has the option to file suit in: (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; (b) the place where the contract was made provided that the defendant has there a place of business, branch, or agency through which the contract was made; or (c) the port of loading or the port of discharge. In addition to these options, Article 21 (d) allows permissive forum selection clauses by stating that the plaintiff has the option to file suit in any additional place designated for that purpose in the contract of carriage by sea. Article 21 (3) prohibits proceedings in a place not specified in Article 21 (1) and (2). Article 23 precludes the circumvention of Article 21 by stating that any clause that deviates directly or indirectly from the provisions of the Convention is null and void.

If the United States had ratified the Hamburg Rules, plaintiffs in *Sky Reefer, Mitsui & Co. (USA)*, or *Fireman's Fund Ins. Co.* could have started arbitration or brought suit in the United States because the port of discharge was situated in the United States.

Senate COGSA '99, § 7 (i)(2) basically adopts Article 21 of the Hamburg Rules. The plaintiff is given the option to file suit in the United States despite an exclusive forum selection clause if the carriage of goods by sea has certain connections with the United States. Article 21 of the Hamburg Rules designates from a *global perspective* certain fora where suit can be brought and the reasons why the designated forum is a proper forum (Article 21 (1)(c) for example states that the place where the port of discharge is situated is a proper forum). Section 7 (i)(2) determines from a *U.S. perspective* when the United States is a proper forum (for example when the port of discharge is situated in the United States). This is simply a different way to describe the same result.

Commentary, LLOYD'S MAR.COM. L.Q. 1, 8 (1979) (stating without substantiation that Article 21 "is a codification of the best jurisprudence".)

However, while Article 21 names only four reasons why suit can be filed in a certain fora, section 7 (i)(2) adds the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them as reasons to file suit in the United States. This provision presumably has been included because U.S. COGSA '99 not only covers transportation by sea, but intermodal transportation in general. In addition, unlike Article 21 of the Hamburg Rules, COGSA '99 designates the United States as a proper forum merely if the contract were made in the United States, and even if the defendant does not have a place of business, branch or agency in the United States.¹⁸¹

3. *Different Regimes*

Comparing the international conventions in maritime and aviation law, three different regimes with respect to forum selection clauses can be identified. First, there are conventions that are silent with respect to forum selection clauses. Such conventions do not deal with the choice of forum question at all, like the Hague Rules and the Visby Amendments, but instead leave the question of where a suit can be filed entirely to the national law of the contracting parties. Second, there are conventions that are forum selection clause averse. Such conventions declare forum selection clauses invalid, like the Brussels Convention relating to the Carriage Of Passengers By Sea. Finally there are conventions that contain forum selection clauses specifying a number of fora among which the plaintiff might choose. Examples of such conventions include the Athens Convention, the Hamburg Rules, and the Warsaw and the Montreal Conventions. For a plaintiff this third solution is most advantageous as his or her rights cannot be restricted by contract, and suit can always be filed in one of the specified fora.

The favored approach today is obviously the last approach mentioned, that is to give a plaintiff the option to file suit in several fora, specified by a convention. This is true for the transportation of goods and passengers. With respect to passenger transportation, there is a general understanding that passengers should be able to file suit in their home jurisdictions, i.e., their domiciles or permanent places of residence.

¹⁸¹ See COGSA 99, *supra* note 139.

B. FORUM SELECTION CLAUSES IN EUROPEAN UNION LAW AND
GERMAN LAW

While provisions in international conventions have an impact on the United States insofar as these conventions are already U.S. law or may become U.S. law in the future, provisions with respect to jurisdiction clauses in the law of the European Union and in Germany obviously do not have the same impact on the United States. Nevertheless, this article will describe the law in both places concerning jurisdiction clauses as examples of different approaches toward jurisdiction clauses. Both EU law and Germany law draw a distinction between consumer contracts and non-consumer contracts.

1. *The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*

In 1968, the European Community adopted the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels Convention on Jurisdiction).¹⁸² One goal of the convention was to harmonize the law concerning "direct jurisdiction" within the member states of the European Community, now the European Union.

a. The basic rules concerning forum selection clauses

The basic rule of jurisdiction established by the Convention is that defendants domiciled in a Contracting State are to be sued in the courts of their state of domicile.¹⁸³ As an exception to this basic rule, Article 17 of the Brussels Convention deals with the permissibility of agreements on jurisdiction. Article 17 (1) provides:

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting

¹⁸² See consolidated and updated version of the Brussels Convention of 1968 and the Protocol of 1971 following the 1989 accession of Spain and Portugal, 1990 O.J. (C184) 33, 34 [hereinafter *Brussels Convention on Jurisdiction*], reprinted in *EUROPEAN COMMUNITIES: CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS*, 29 I.L.M. 1413 (1990). See also WILLIAM W. PARK, *INTERNATIONAL FORUM SELECTION* 143-50 (1995); PETER BYRNE, *THE EEC CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS* 23-103 (1990); ALAN DASHWOOD, *A GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION*, 25-33 (1987).

¹⁸³ According to Article 52, the domicile is to be determined by applying the law of the Contracting State before whose courts action is brought. 29 I.L.M. 1413, 1429 (1990).

State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:

- 1) in writing or evidenced in writing; or
- 2) in a form which accords with practices which the parties have established between themselves; or
- 3) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to a contract of the type involved in the particular trade or commerce concerned.¹⁸⁴

Article 17 authorizes parties to agree upon jurisdiction clauses. A valid agreement on jurisdiction confers exclusive jurisdiction on the chosen court.¹⁸⁵ Article 17 does not restrict the places where suit can be filed. It only specifies certain formal requirements that have to be satisfied in order to make the agreement valid.¹⁸⁶ The approach of Article 17 thus differs from the international conventions discussed above and from Senate COGSA'99 where no formal requirements are specified.

Article 17, however, is not applicable to the following consumer¹⁸⁷ contracts:¹⁸⁸ (1) contracts for the sale of goods on installment credit terms, (2) contracts for a loan repayable by installment, and (3) contracts for the supply of goods or services if in the State of the consumer's domicile the conclusion of the contract was preceded by specific invitation addressed to him or by advertising, and the consumer took in that state the steps necessary for the conclusion of the contract.¹⁸⁹ With respect to these contracts, the consumer may sue either in the courts of the state in which he is domiciled or in the courts of the state in

¹⁸⁴ See PETER STONE, *CIVIL JURISDICTION AND JUDGEMENTS IN EUROPE* 115-16 (1998).

¹⁸⁵ STONE, *supra* note 186, at 125; see also Yvonne Baatz, *The Jurisdiction Of The English Courts To Determine Cargo Claims Under The Lugano Convention*, in *NEW CARRIAGE OF GOODS BY SEA: THE NORDIC APPROACH INCLUDING COMPARISONS WITH SOME OTHER JURISDICTIONS* 283, 288. (1997).

¹⁸⁶ A jurisdiction clause is only valid if it satisfies the formal requirements of Article 17, Case 24/76, *Estasis Salotti di Colzani Amio v. Ruewa* 1976 E.C.R. 1831.

¹⁸⁷ A consumer is defined in Article 13 as a person that "has concluded a contract for a purpose which can be regarded as being outside his trade or profession." Brussels Convention on Jurisdiction, *supra* note 182, at 1421.

¹⁸⁸ Article 17 (3) in conjunction with Article 15. *Id.* at 1422-23

¹⁸⁹ Article 13 (1). *Id.* at 1421.

which the other party is domiciled. The other party, however, may only sue in the courts of the State where the consumer is domiciled. The consumer can waive his right only after the dispute has arisen. The objective of these provisions was "to protect consumers, who are taken to be in a weaker bargaining position than the commercial undertaking with whom they deal."¹⁹⁰

b. Forum selection clauses in form passenger contracts

Article 17 is applicable to maritime contracts as well. However, it should be mentioned that according to Article 57, "the Convention shall be without prejudice to any convention to which the Contracting States are or will be parties, governing jurisdiction."¹⁹¹ International conventions in transportation law that contain jurisdictional provisions like the Warsaw Convention therefore prevail.¹⁹² But in maritime law, most countries in the European Union have ratified neither the Hamburg Rules nor the Athens Convention. Therefore, Article 17 is still relevant in maritime law.

With respect to form passenger contracts, the law according to the Brussels Convention on Jurisdiction is not totally clear. On one hand, Article 13 (3) precludes the application of the consumer protection provisions of the Convention to contracts for transportation.¹⁹³ But on the other hand, commentators have concluded that a cruise contract must be characterized as a contract for the supply of services and not as a contract of transportation because the service elements of such a contract are more important.¹⁹⁴ It seems probable that a court would apply

¹⁹⁰ Convention Of The Accession to the 1968 Convention of Denmark, The Republic of Ireland and the United Kingdom, *reprinted* in DASHWOOD, *supra* note 184, at 110; *see also* STONE, *supra* note 186, at 83.

¹⁹¹ STONE, *supra* note 184, at 16.

¹⁹² *See* Schlosser Report 1979 O.J. (C.59/140) (explaining that where a special convention contains no provision directly governing jurisdiction, the jurisdiction provisions of the 1968 Convention apply; where all the Contracting States are parties to a special convention containing provisions on jurisdiction, like the Warsaw Convention for the unification of certain rules relating to international carriage by air, those provisions prevail).

¹⁹³ The reason stated in the Schlosser-Report for leaving contracts of transport out of the scope of the special consumer protection provisions in the 1968 Convention is that such contracts are subject under international agreements to special sets of rules with very considerable ramifications. *Id.* at 119.

¹⁹⁴ Eric Jayme, *U.S. Supreme Court: Zur Wirksamkeit grenzüberschreitender Gerichtstandsklauseln in Verbraucherverträgen*, IPRAX 1993, 42, 43; Karsten Thorn, *Verbrauchergerichtsstand nach EuGVÜ und örtliche Zuständigkeit*, IPRAX 1994, 426, 426.

the provisions concerning consumer contracts to cruise contracts and, therefore, would prohibit jurisdiction agreements in advance. It is important to emphasize, however, that consumers are only protected when the contract was solicited in the State of the consumer's domicile and the contract was concluded there. But that would surely cover a case like *Effron*.

c. Forum selection clauses in bills of lading

With respect to bills of lading, Article 17 (1)(c) is of crucial importance. Article 17 (1)(c) was added to the Convention in 1979 as a reaction to several decisions of the European Court of Justice holding that written confirmation of the inclusion of a jurisdiction clause is necessary before such a clause becomes effective.¹⁹⁵ Ruling on jurisdiction clauses in a standardized bill of lading, the European Court of Justice held that "a jurisdiction clause was an agreement in writing or an oral agreement evidenced in writing"¹⁹⁶ for the purpose of Article 17 if either the agreement of the parties to the bill of lading had been expressed in writing; or if the clause had been orally agreed by the parties before its incorporation in the bill so that the bill of lading signed by the carrier constituted confirmation in writing of that agreement; or if the bill was part of a continuing business relationship between the parties which was itself governed by general conditions including the jurisdiction clause."¹⁹⁷ Such a procedure, however, is unusual with respect to the issuance of bills of lading, which are often "issued after the contract has been concluded between the shipper and the carrier without any specific mention of jurisdiction having been made".¹⁹⁸

Article 17 (c) was adopted to facilitate international trade¹⁹⁹ Article 17 (c) reduces the formal requirements that have to be

¹⁹⁵ See Schlosser Report, 1979 O.J. (C 59/124).

¹⁹⁶ See Brussels Convention on Jurisdiction at art. 17 (1)(a), *supra* note 184, at 1422.

¹⁹⁷ Case C-71/83, *Russ/Nova*, 1984 E.C.R. 2417.

¹⁹⁸ Baatz, *supra* note 187, at 291.

¹⁹⁹ The Schlosser Report explained that the Court's interpretation of Article 17 did not cater adequately for the customs and requirements of international trade. International trade is heavily dependent on standard conditions that incorporate jurisdiction clauses. Nor are those conditions in many cases unilaterally dictated by one set of interests in the market; they have frequently been negotiated by representatives of the various interests. Owing to the need for calculations based on constantly fluctuating market prices, it has to be possible to conclude contracts swiftly by means of a confirmation of order incorporating sets of conditions. See Schlosser Report, 1979 O.J. (C 59/125).

satisfied when the jurisdiction clause is made between parties in international trade or commerce. In this case, it is enough that the agreement was made in a form that accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to a contract of the type involved in the particular trade or commerce concerned. A usage exists in a branch of trade or commerce when a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.²⁰⁰ According to most commentators, the one-sided issuance of bills of lading is acceptable pursuant to Article 17 (1)(c). Such a jurisdiction clause is then valid not only between the carrier and the shipper but also between the carrier and the consignee.²⁰¹

2. *Jurisdiction Clauses In German Law*

In contrast to the current U.S. approach, the law in some European countries²⁰² is reluctant to enforce forum selection clauses. The law of Germany is an example.

a. The Basic Rules Concerning Forum Selection Clauses

In Germany, the general rules describing the requirements under which a forum selection clause is valid, are provided by § 38 ZPO.²⁰³ The law distinguishes between three situations. The first situation occurs when both parties are residents of Germany, or are domiciled or have their place of business in Germany. In this situation, only merchants,²⁰⁴ juridical persons of public law, or separate estates created under public law can

²⁰⁰ Case 106/95, *MSG Mainschiffahrts-Genossenschaft v. Les Gravieres Rhenanes*, 1997 E.C.R. I-911.

²⁰¹ The European Court of Justice has ruled that "if the jurisdiction clause was effective as between the carrier and the shipper, it was also effective between the carrier and the holder of the bill of lading provided that, under the relevant national law, the holder of the bill of lading succeeded to the shipper's rights and obligations under it." Case 71/83, *Russ v. Nova*, 1984 E.C.R. 2417.

²⁰² Like German law, French and Swiss law does not enforce forum selection clauses against consumers. See *PARK*, *supra* note 184, at 151-156.

²⁰³ The ZPO is the German Code of Civil Procedure. This article will not discuss the relationship between § 38 ZPO and Article 17 of the Brussels Convention. But where the Brussels Convention applies, Article 17 of the Brussels Convention enjoys priority.

²⁰⁴ The term "merchant" is defined in the Commercial Code (HGB) as a person who conducts certain commercial operations and commercial companies and partnerships.

agree upon a forum selection clause.²⁰⁵ The second situation occurs when one party is not a resident of or domiciled in Germany or does not have his/her principal place of business in Germany. In this case, a forum selection clause is valid, if certain requirements are fulfilled.²⁰⁶ The agreement has to be either in writing or, if the parties agreed orally, must be acknowledged in writing. The third situation occurs when none of the parties is domiciled or resident or has their principal place of business in Germany. In this case, the parties are not restricted from entering into a forum selection agreement. Section 38 ZPO, in short, permits pre-dispute jurisdiction agreements only if they have been concluded either by merchants or between parties, where at least one party is neither a resident of Germany nor domiciled in Germany nor has a place of business in Germany.

b. Forum selection clauses in bills of lading

Section 38 ZPO applies to maritime contracts so long as no special provisions apply. Germany ratified the Hague Rules and implemented them into the German Commercial Code in 1937.²⁰⁷ The Visby-Amendments and the Hamburg Rules have not been ratified by Germany.²⁰⁸ Nevertheless, the Visby Amendments have been incorporated entirely into German Law.²⁰⁹ Because neither the Hague Rules nor the Visby Amendments contain provisions concerning jurisdiction clauses, § 38 ZPO applies with respect to contracts of carriage. Therefore, a jurisdiction clause between a German party and a party not domiciled or a resident or who does not have his/her principal place of business in Germany is valid, but only if it is either in

²⁰⁵ § 38(1) ZPO.

²⁰⁶ § 38(2) ZPO.

²⁰⁷ Seefrachtgesetz v. 10.8.1937 (RGBl. I. S891); see also, Tetley, *supra* note 135, at 608.

²⁰⁸ The Hamburg Rules have been strongly opposed by German ship owners and cargo insurers. See Rolf Herber, *German Law On The Carriage Of Goods By Sea*, in *NEW CARRIAGE OF GOODS BY SEA: THE NORDIC APPROACH INCLUDING COMPARISONS WITH SOME OTHER JURISDICTIONS* 346 (1997).

²⁰⁹ 2. SÄG v. 25.7. 1986, (BGBl. I. S1120). The German Government intended to modernize the law of carriage of goods, but reportedly "did not want to give the impression to other states which had taken part in the Hamburg Conference that Germany had finally given up hope of further improvement in the standard of liability with respect to carriage of goods by sea." *Id.*; see also Herber, *supra* note 208, at 346.

writing or, if the parties agreed orally, was acknowledged in writing.

c. Forum selection clauses in form passenger contracts

With respect to passenger contracts, Germany has not ratified the Athens Convention so far,²¹⁰ but has implemented parts of the Convention into its national maritime law.²¹¹ Article 17 of the Athens Convention is incorporated only in part. The relevant provision²¹² designates as a proper forum, the court of the place of departure or that of the destination, according to the contract of carriage. A provision that restricts these two fora is null and void.²¹³ To this extent, Article 17 (1)(b) and Article 18 of the Athens Convention have been adopted. The other options for the claimant in Article 17 (1) have not become part of German law. According to the legislative materials,²¹⁴ the intention of the German legislature was to ensure that, where German law is applicable, a claimant has the possibility to file suit in a German court. Because a provision in German international private law assures that German law always applies to cruise contracts,²¹⁵ the Court of the place of departure and destination is,

²¹⁰ Germany has not ratified the Athens Convention because the limitations of liability have been regarded as too low. Germany has therefore implemented its own, higher liability limitations. (In case of death or personal injury, the limit is DM 320,000). The Scandinavian countries and Germany have urged increasing the limits in the Athens Convention as well. In 1990, International Maritime Organization (IMO) adopted a protocol to the Athens Convention, which raises the liability limits. It is expected that the Convention will be ratified by Germany in the near future, so long as IMO and CMI do not realize their new plans to amend the Convention, *See Herber, supra* note 208, at 346.

²¹¹ 2. SÄG v. 25.7. 1986 (BGBl. I. S1120). The Athens Convention is implemented as an appendix to § 664 HGB to which § 664 refers.

²¹² § 664 app. art. 14 HGB.

²¹³ § 664 app. art. 15 HGB.

²¹⁴ BT-Drs. 10/5539/ p. 25; *see also* Jürgen Basedow, *Kollisionsrechtliche Aspekte der Seerechtsreform von 1986*, IPRax 87, 333, 341.

²¹⁵ Whether German law is applicable with respect to a contract is defined in Articles 27 - 29 EGBGB, the statute dealing with international private law/conflicts of law. Accordingly, the parties have the freedom to choose the applicable law *See* (art. 27(1) EGBGB (A contract shall be governed by the law chosen by the parties). This rule however, is restricted with respect to certain consumer contracts. art. 29(1) states in the relevant parts:

For a contract the object of which is the supply of . . . services for a purpose which can be regarded as being outside the business or profession of the recipient (consumer) . . . a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the state in which he has his habitual residence: if in that state the

at least with respect to cruise contracts, always a proper forum, and this right cannot be waived by the passenger.

IV. HOW U.S. MARITIME LAW SHOULD DEAL WITH FORUM SELECTION CLAUSES

After examining jurisdiction provisions in international conventions, and in European and German law, concerning transportation law, a final evaluation of the current U.S. law and U.S. Senate COGSA '99 with respect to forum selection clauses can be made.

A. FORUM SELECTION CLAUSES IN PASSENGER CONTRACTS

With respect to forum selection clauses in passenger contracts, the conclusion can be drawn that none of the examined regimes allow a choice of forum clause in form passenger contracts and, at the same time, prohibit such agreements in bills of lading. This, however, would be the situation in the United States, if Senate COGSA '99 becomes law without adopting a similar provision for form passenger contracts. U.S. law does not currently make a distinction between consumers and businessmen with respect to the enforceability of forum selection clauses as is the case in European jurisdictions. It should, however, be noted that it seems inappropriate to give more protection to businessmen than to consumers.

According to European and German law, jurisdiction agreements are generally prohibited in consumer contracts. This reflects a general perception that consumers should be protected. On an international level, modern international conventions in transportation law like the new Montreal Convention and the Athens Convention reflect the idea of consumer protection by giving passengers non-waivable rights to pursue claims in specified fora the most important of which is the court of their domicile or permanent residence. These conventions thus effectively nullify *exclusive* forum selection agreements.

conclusion of the contract was preceded by a specific invitation addressed to him by advertising, and he had taken in that state all the steps necessary on his part for the conclusion of the contract.

§ 29 EGBGB.

According to Article 29(2) a consumer contract shall be governed by the law of the state in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 1. art. 29 (4) excludes contracts of carriage from the provisions of Article 29, but not if it is a travel contract that, for an inclusive price, provides for a combination of travel and accommodation. *Id.*

In the United States, only with respect to transportation by air it is the accepted solution that passengers should have the option to sue in their home jurisdiction. But there is no reason that justifies a different view regarding transportation by sea. Because it is not likely at the moment that the United States will join the Athens Convention or that a "Warsaw Convention" for the transportation of passengers by sea will enter into force in the near future,²¹⁶ the United States should implement legislation that protects passengers at least from exclusive forum selection clauses designating a *foreign* forum. This would bring maritime law in accordance with aviation law. Such protection is especially justified when the contract was solicited and concluded in the United States.²¹⁷

Whether protection of passengers is adequate with respect to exclusive forum selection clauses designating a forum *inside* the United States is less clear. Here again, there seems to be no persuasive reason why passengers by sea should be treated differently from passengers by air. The question arises, however, if a U.S. airline were to adopt a forum selection clause limiting U.S. domestic passengers to suit in, say Atlanta, would that clause be valid and enforceable under *Carnival Cruise*?²¹⁸

B. FORUM SELECTION CLAUSES IN BILLS OF LADING

Senate COGSA '99 basically adopts Article 21 of the Hamburg Rules. Because the Hague Rules left the issue of whether forum selection clauses are enforceable to national law,²¹⁹ the adoption of Article 21 may be achieved without denouncing the Hague Rules. The crucial question of course is whether the adoption of Article 21 is a proper solution.

Putting aside the special interests of U.S. maritime lawyers, who presumably want as much litigation as possible take place in the United States,²²⁰ Senate COGSA '99 may reflect the fact that the United States is no longer a significant maritime carrier

²¹⁶ It seems to be, however, that a Warsaw/Montreal 99 system with respect to the carriage of passengers by sea would make sense. Why should passengers by sea enjoy less protection than passengers by air?

²¹⁷ See Art.13 (1), Brussels Convention on Jurisdiction, *supra* note 184.

²¹⁸ An increasing number of U.S. commentators have concluded that U.S. law, like the law in European countries, should protect consumers in general. See *e.g.*, PARK, *supra* note 184.

²¹⁹ *Proposed Amendments*, *supra* note 108, at 657.

²²⁰ There is concern that U.S. cargo and defense attorneys will have to look for other employment. See *e.g.*, Davis, *supra* note 7, at 88.

country. Rather most of U.S. imports as well as exports are carried on foreign flag vessels.²²¹ The U.S. flag fleet is shrinking almost to the point of non-existence. It is therefore understandable for the United States to want to protect the interests of cargo owners.

Other countries recently have taken the same step. In 1994, Finland for example, incorporated provisions based on Article 21 of the Hamburg Rules into the Finnish Maritime Code (FMC) to protect its consignees.²²² According to the bill, the goal was "to improve the cargo owner's possibilities to bring an action in a court with a natural connection to the contract of carriage enhancing the plaintiff's possibilities to get effective enforcement of a possible judgment."²²³

A provision like § 7 (i) (2) of Senate COGSA '99 protects U.S. cargo owner interests without damaging the interests of U.S. carriers in the short run. So long as foreign countries do not prohibit forum selection clauses, U.S. carriers still can profit from such clauses. Because the United States is the most important trading nation in the world, however, it can be expected that other countries will soon adopt similar legislation to avoid a situation where all claims arising out of bills of lading will be litigated in the United States. The adoption of Article 21 of the Hamburg Rules as U.S. law will therefore in the long run more than likely lead to the worldwide acceptance of Article 21.

Stricter formal requirements to protect cargo owners and shippers are, however, not advisable. The example of Art 17 (1)(c) of the Brussels Convention on Jurisdiction demonstrates that stricter formal requirements are no solution with respect to bills of lading. The Schlosser Report stated correctly "international trade is heavily dependent on standard conditions which incorporate jurisdiction clauses."²²⁴ While stricter formal requirements might be reasonable with respect to consumer contracts, in international trade, such requirements only complicate doing business.

²²¹ In 1995, less than 150 vessels were flying the American flag. See Kirsten Boehmann, *The Ownership and Control Requirements in U.S. and European Air and Maritime Law—Policy; Consideration; Comparison*, 66 J. AIR L. & COMMERCE 689 (2001).

²²² Wetterstein, *supra* note 4, at 321, 331.

²²³ Wetterstein, *supra* note 4, at 330.

²²⁴ 1979 O.J. (C 59/125).

APPENDIX

COMPARISON OF ARTICLE 21 OF THE HAMBURG RULES AND COGSA '99

Hamburg Rules	COGSA '99
(a) The principle place of business or, the habitual residence of defendant	(C) The principal place of business or, the habitual residence of defendant is in the U.S.
(b) The place where the contract was made provided that the defendant has there a place of business, branch, agency through which the contract was made.	(D) The place where the contract was made is in the U.S.
(c) The port of loading or the port discharge.	(A) The port of loading or the port of discharge is, or was intended to be, in the U.S.
(d) Any additional place designated for that purpose in the contract of carriage by sea	(E) A forum specified for litigation or arbitration under a provision in the or other agreement is in the U.S.
	(B) The place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the U.S.